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No. 07-

IN THE

# Supreme Court of the United States

GEORGE CRAWFORD,

*Petitioner,*

*v.*

BURL CAIN, Warden, Louisiana State Penitentiary,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) and its progeny, failure to disclose evidence favorable to an accused is material and mandates a new trial if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985), or where "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995) (the "*Bagley/Kyles*" standard). Materiality of the suppressed evidence must be assessed cumulatively. *Id.* Under *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340 (1935), *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959) and their progeny, the knowing use of false testimony or failure to correct false testimony is material and mandates a new trial if there is any reasonable likelihood that the false testimony could have affected the jury's verdict (the "*Napue* standard"). **There is a conflict in the circuits as to whether these standards are equivalent, or whether the *Napue* standard is less stringent.** In the context of this case, the following questions are presented:

1. Whether the Fifth Circuit erred by evaluating instances involving the State's knowing presentation of false testimony and failure to correct it under the *Bagley/Kyles* standard of materiality rather than the *Napue* standard?

2. Whether the Fifth Circuit erred by failing to evaluate the cumulative impact of suppressed evidence and false testimony in the context of the whole case?

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Petitioner George Crawford respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A) is unreported but available at *Crawford v. Cain*, No. 06-30892, 2006 WL 2491034 (C.A.5 (La.), August 30, 2007). The opinion of the district court (Appendix B) is unreported but available at *Crawford v. Cain*, No. Civ. A. 04-0748, 2006 WL 1968872 (E.D. La. July 11, 2006). The opinion of the Court of Appeal of Louisiana, Fourth Circuit, is reported at 848 So.2d 615 (February 12, 2003) (Appendix C).

## STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals opinion was filed August 30, 2007. The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

**The Fourteenth Amendment of the United States Constitution** provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

**28 U.S.C. § 2254.** State custody; remedies in Federal courts

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

Petitioner appeals the denial of his petition under 28 U.S.C. § 2254 for a writ of habeas corpus.

On the afternoon of September 22, 1994, Sheri Bailes and Elijah Mitchell were shot as they sat in Bailes's car parked in the street in front of the Fischer housing project in Algiers. Both Bailes and Mitchell received multiple gunshot wounds, and were unable to speak to officers arriving at the scene. Bailes died later that day, but Mitchell, despite receiving ten gunshot wounds, eventually recovered.

Petitioner and co-defendant Larry Lindsey were convicted of murdering Bailes after a one-day guilt-

phase jury trial in January, 1997. The only evidence implicating Petitioner was the uncorroborated testimony of two witnesses — Mitchell, who was hit in the head by a 9mm bullet before seeing anything and then was riddled with nine other bullets in the head and body, and a woman named Shirley Davis. Mitchell identified Petitioner from a photo array two weeks after the shooting, and Davis identified him in a photo array two months later. Both identified Petitioner in court as the second shooter. There was no physical evidence corroborating their testimony.

Davis's testimony was inconsistent with the physical evidence. She testified that the shooters began firing from the porch of one of the project buildings, just beyond a breezeway. Yet all of the shell casings from expended rounds were found in the street, more than fifty feet away, or in the car where the victims were sitting. No casings were found near the porch or the breezeway.

The testimony of Davis and Mitchell was also mutually inconsistent. Davis testified that the shooters began shooting from the porch of the housing project, more than fifty feet from where the victims were parked in the street. Mitchell testified that they started shooting just a few feet from him in the car. Davis testified that the second shooter wore a blue bandana, long blue jeans and a dark-colored long-sleeve sweatshirt. Mitchell testified that the second shooter wore a light-colored T-shirt and tan or khaki colored pants, possibly shorts. Davis testified that both shooters had large Uzi-type guns, about ten inches each; Mitchell testified that Larry Lindsey had a Tech 9 (similar to an Uzi), but that the second shooter had "smaller gun", a pistol.

The Louisiana Court of Appeal affirmed Petitioner's conviction on the basis of an errors-patent brief filed by counsel appointed under the indigent defender program. Thereafter, Petitioner learned that the State failed to disclose multiple items of evidence favorable to the defense — a 911 log, a supplemental police report and transcriptions of pre-trial statements by both Mitchell and Davis. The undisclosed evidence revealed the following, among other things: (1) certain trial testimony by Mitchell, Davis and the investigating officer was false; (2) there were numerous inconsistencies between the pretrial statements of Mitchell and Davis and their trial testimony that could have been used for impeachment; (3) a specific alternative suspect had been identified early in the investigation; and (4) the police incompetently failed to locate the alternative suspect's arrest record and follow up on the lead.

In particular, evidence of false testimony included the following:

- At trial, Mitchell testified that at the time of the shooting he knew the second shooter's name to be George Crawford. In his pretrial statement, Mitchell said that he only knew the second shooter as George.

- At trial, Davis testified that, in her pretrial statement to the police, she specifically identified certain of her relatives who witnessed the shooting. In fact, Davis did not identify any such witnesses in her pretrial statement.

- At trial, Detective Anthony Graffeo, the investigating officer, testified on direct examination that he did not promise anything to Davis to make the photo identifications. Davis also testified on direct examination that she was not promised anything in relation to her photo identification of Lindsey. The supplemental police report and her pretrial statement reveal that Davis came forward only on the condition that she be provided another apartment, and that Detective Graffeo promised that he would put her through the proper channels to do that. After the interview, an apartment was in fact offered to Davis, who turned it down because she did not want to live in the area offered.

- At trial, Graffeo testified that Davis "did not have a last name" on the second shooter, and that Graffeo received numerous last names from others, "but no one was positively sure what it was. They just knew that he hung around the area. That he didn't live there." The supplemental police report revealed that Davis in fact had two last names for the second shooter, Ascort and Caldwell, which she provided to the police. The supplemental report also revealed that another anonymous caller identified the second shooter as "George Jefferson," who "lived or frequented the area of 2000 Lebouef Ct." — the same building in which Davis lived, immediately behind the building fronting the location where the shooting occurred. Jefferson in fact had an arrest record listing that address, which Graffeo testified he did not locate. Before trial, Jefferson was himself killed in the same block as the Bailes shooting.

Petitioner filed a petition for collateral review in the state court in October, 2000, asserting that (1) the evidence was insufficient to sustain the verdict; (2) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny by failing to disclose exculpatory and impeachment evidence; and (3) ineffective assistance of counsel at trial and on appeal. This was denied on July 11, 2002, and the Louisiana Fourth Circuit Court of Appeal affirmed on February 12, 2003. Rehearing was denied, as was Petitioner's application to the Louisiana Supreme Court. On March 15, 2004, Petitioner timely filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Louisiana. The district court denied the petition on July 11, 2006.

On October 27, 2006, the District court granted Petitioner's request for a certificate of appealability, limited to his *Brady* claims. On August 30, 2007, the Fifth Circuit Court of Appeals affirmed, finding that, although the State had indeed failed to disclose various items of exculpatory and impeachment evidence, none of it was material.

In its opinion, the Fifth Circuit stated that "the test for materiality is 'whether disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different,'" citing *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995). This same standard was erroneously applied across the board, even where the *Brady* materials revealed that the prosecutor knew or should have known that witnesses provided false testimony and failed to correct it. In that circumstance, the Court should have

applied the stricter standard of materiality derived from *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959) (false testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury").

There is compelling reason to distinguish between a failure to disclose exculpatory or impeachment evidence and knowingly using false testimony, or failing to correct it, at trial. As this Court noted in *United States v. Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2397 (1976), the latter situation is far more serious because it involves prosecutorial misconduct and "corruption of the truth-seeking function of the trial process." The circuits are split as to which standard of materiality applies where the government knowingly uses false testimony and fails to correct it. This analytical confusion is especially significant where, as here, the exculpatory or impeachment evidence that the government fails to disclose also demonstrates the falsity of the testimony presented and the government's knowledge of the falsity.

Lastly, regardless of the standard, the Fifth Circuit arbitrarily failed to assess the cumulative impact of the suppressed evidence and false testimony in the context of the case as a whole, as mandated by *Kyles* Here the "case as a whole" consisted solely of the uncorroborated testimony of Mitchell and Davis. Yet neither the Fifth Circuit nor any other court has acknowledged that Davis's version of events was belied by the physical evidence, i.e., placement of the shell casings and cartridges. The shooters simply could not have fired their guns where she said they did. No court has acknowledged that the versions of the shooting to which Mitchell and

Davis testified were inconsistent, and that both could not have been true. The Fifth Circuit failed to consider that the 911 log would have provided objective corroboration that Mitchell's description of the second shooter's clothing was not true. And the Fifth Circuit failed to consider that the suppressed evidence and false testimony would have enabled the defense to point to a specific alternative suspect with an arrest record whom the police incompetently failed to investigate.

The Fifth Circuit simply accepted the veracity of the photo identifications, which it and the other courts deemed to be independent, self-corroborating and apparently insurmountable proof of Petitioner's guilt. The Court of Appeals failed to acknowledge that the veracity of the photo identifications depended on the credibility of Mitchell and Davis, and that the suppressed evidence and false testimony would have seriously impacted their credibility. Perhaps most importantly, the Court of Appeals failed to consider that the suppressed evidence, cumulatively, would have provided the defense with a plausible, coherent argument that the photo identifications of Petitioner were not independent and accurate, but interrelated and false.

In the context of this weak case, where the credibility of the only two eyewitnesses was essential to the verdict, the Fifth Circuit's utter failure to conduct any meaningful analysis of the cumulative impact of the exculpatory evidence and false testimony in the context of the whole case was arbitrary, capricious, and a denial of due process.

## REASONS FOR GRANTING THE PETITION

### A. There Is A Conflict Among The Circuits As To The Standard For Determining The Materiality Of False Testimony Knowingly Or Negligently Presented And Not Corrected By The Government.

In this case, the Fifth Circuit wrongly used the standard of materiality applicable to non-disclosure of exculpatory and impeachment evidence in assessing the prosecution's knowing or negligent use of false testimony and the cumulative impact of all such materials. This standard was first elucidated in *Bagley*, which held that suppressed evidence favorable to the accused is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682, 105 S. Ct. at 3383. However, a series of decisions commencing with *Mooney* and *Napue* establish that where the government presents testimony it knew or should have known was false and leaves uncorrected, materiality is determined under a different, and lesser, standard. In such cases, a conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *Napue*, 360 U.S. at 271; *Agurs*, 427 U.S. at 103. **While some circuits, including the First, Second, Eighth and Eleventh, recognize this distinction, others, including the Seventh and Ninth Circuits, do not. This conflict among the circuits on an often-determinative and purely legal issue must be resolved.**

More than seventy years ago, this Court established the rule that the knowing use by a state prosecutor of perjured testimony and the deliberate suppression of evidence that would have impeached and refuted that testimony violates due process. In *Mooney*, the Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice. *Id.*, 294 U.S. at 112, 55 S. Ct. at 341. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177. The Court in *Napue* further explained that, "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .'" *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972), quoting *Napue*, *supra*, at 271, 79 S. Ct. at 1178 (the "*Napue* standard").

Citing *Mooney* and *Napue*, among other cases, as predicates, the Court in *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . ." 373 U.S. at 87, 83 S. Ct. at 1196-97. Favorable evidence includes evidence affecting the credibility of a witness. *Giglio*, 405 U.S. at 154-55, 92 S. Ct. at 766.

In 1976, looking back at its earlier decisions, the Court in *Agurs* found that "[t]he rule in [*Brady*] arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103, 96 S. Ct. at 2397.

> In the first situation, typified by [*Mooney*], the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury [citing *Giglio* and *Napue*]. . . . [I]n those cases the Court has applied **a strict standard of materiality**, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process."

427 U.S. at 103-04, 96 S. Ct. at 2397.

Since *Agurs* did not involve false testimony, the Court found the *Mooney* line of cases inapplicable. However, the Court proceeded to discuss *Brady* materiality in other situations — where there is no request for *Brady* material; where there is a general request for such material, and where the defense makes

a specific request. The Court held that the standard of materiality would vary in each of these situations, being most strict where no request was made, and least strict in the context of a specific request. *Id.* at 103, 106, 111-12, 107, 96 S. Ct. at 2397-99.

Nine years later, in *Bagley*, the Court reconsidered the *Agurs* formulation of materiality **in the absence of false testimony.** The Court held that where the prosecution has failed to disclose evidence favorable to the accused, a single standard of materiality would apply regardless of whether any request was made, and regardless of the specificity of the request — "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." 473 U.S. at 682, 105 S. Ct. at 3383. This formulation was later affirmed and further explained in *Kyles* 514 U.S. at 433-41, 115 S. Ct. at 1565-69 (the *Bagley/Kyles* standard).

While formulating a new standard of materiality for non-disclosure of exculpatory or impeachment evidence, the Court in *Bagley* acknowledged the continuing vitality of the *Napue* "rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict . . . ." 473 U.S. at 680 n.9, 105 S. Ct. at 3382 n.9. In *Kyles* the Court again recognized that the *Napue* standard applied to claims involving the knowing presentation of false testimony, and expressly declined to consider any such claim. 514 U.S. at 433 n.7, 115 S. Ct. at 1565 n.7.

In short, this Court's decisions have uniformly acknowledged that the *Napue* standard of materiality applies where testimony has been presented that the government knew or should have known was false and failed to correct. Moreover, no decision of this Court has equated the *Napue* standard with the *Bagley/Kyles* standard.[1] On the other hand, numerous courts and commentators have recognized that the *Napue* standard "has a lower threshold than the "reasonable probability" requirement of *Brady*." 5 LaFave, Israel & King, *Criminal Procedure*, Second Edition, § 24.3(d), p. 498. *See, e.g., Gilday v. Callahan*, 59 F.3d 257, 267 (1st Cir. 1995), *cert. denied*, 516 U.S. 1175, 116 S. Ct. 1269 (1996) (*Napue* standard is "more favorable to the defendant"); *United States v. Vozzella*, 124 F.3d 389, 392 (2d Cir. 1997) (*Napue* standard is "a strict standard of materiality", in contrast to the *Bagley/Kyles* applicable in the absence of knowing use of false testimony); *United States v. Gonzales*, 90 F.3d 1363, 1368 n.2 (8th Cir. 1996) (*Napue* standard "more favorable to the accused"); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (*Napue* standard "more defense friendly"). Indeed, the Second Circuit has stated that where the government knowingly offers perjured testimony, a new trial is "virtual[ly] automatic." *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975).

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1. In *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256 (2004), both *Brady* and *Napue* claims were asserted, as here, under the umbrella of "Brady" claims. This Court held that the petitioner qualified for relief under a straight *Brady* standard, and declined to address the *Napue* issues separately. 540 U.S. at 689, n.11, 124 S. Ct. at 1273 n.11.

Despite this Court's unbroken line of cases distinguishing between the lesser *Napue* and more stringent *Bagley/Kyles* standards of materiality, and in conflict with the First, Second, Eighth and Eleventh Circuits, among others, the Ninth and Seventh Circuits have wrongly equated the two standards. *See Silva v. Brown*, 416 F.3d 980, 986 n.1 (9th Cir. 2005); *Morris v. Ylst*, 447 F.3d 735, 745 (9th Cir. 2006); *United States v. Boyd*, 55 F.3d 239245 (7th Cir. 1995). In this case, to Petitioner's prejudice, the Fifth Circuit did likewise.

In sum, the conflict among the circuits is clear and direct, and evidences a disagreement on a pure issue of law. This conflict fosters uncertainty as to the applicable standard of review where false testimony has been knowingly presented and not corrected, and uncertainty among habeas petitioners

**B. Petitioner Was Prejudiced By The Fifth Circuit's Application Of The Wrong Standard In Evaluating The Materiality Of The State's Knowing Presentation Of False Testimony**

As discussed in detail in its briefs to the Fifth Circuit, this was a weak case entirely dependent on the testimony of two purported eyewitnesses, Mitchell and Davis. There was no corroboration for either. Their testimony as to how the shooting occurred was mutually inconsistent — Mitchell testified that the shooters began firing right next to the car in which he and Bailes were sitting, in the street, while Davis testified that the shooters began firing from the front porch of a nearby project building more than 50 feet away from the street. Their descriptions of the second shooter's clothing were also inconsistent, as were their descriptions of the weapon used by the second shooter.

Mitchell's credibility was further weakened by the fact that he claimed to have seen and identified Petitioner only after being hit in the head with a 9 mm. bullet, and while being pummeled with nine additional bullets — including two more in the face. His description of the second shooter's clothing was curiously identical to the clothing he said he had seen Petitioner wearing the previous day — but inconsistent with the descriptions provided by Davis and by contemporaneous witnesses on the suppressed 911 log. Implausibly, Mitchell also testified that after being hit by ten 9mm bullets, he remained conscious, but no one questioned him at the scene; testimony by investigating officers established that Mitchell was in fact unconscious and unable to provide a statement.

An important factor in the Fifth Circuit's analysis, and presumably in the jury's, was Mitchell's testimony that he knew Petitioner. At trial he testified that he knew him by his full name: George Crawford. However, his undisclosed pretrial statement reveals that at the time he made that statement, he only knew the second shooter by his first name, George. This information would have clouded Mitchell's claim to have known Petitioner, and would have demonstrated that he actually lied on the stand, arguably to bolster his credibility. A lie in the courtroom can hardly be called inconsequential, particularly where, as here, it relates to the central focus of Mitchell's testimony — his prior knowledge of and ability to identify Petitioner.

Davis's testimony was not only inconsistent with Mitchell's, but was belied by the physical evidence. All of the shell casings were found in the street or in the car, not up on the porch or even near it, so the shooting simply could not have happened as she claimed. Thus, her credibility was at best questionable.

Davis (and Graffeo) testified — on direct examination — that she was not promised anything to make the photo identifications. But that was not true. She was promised consideration for a new apartment, and was actually offered a new apartment, which was the condition on which she came forward. This motive for her initial cooperation would have been important in and of itself, but the fact that she would lie about it, or at least mislead the jury about it, could not fail to be significant. Similarly, Davis' pre-trial statement belied her trial testimony that she specifically told the police her mother, aunt and cousins had seen the shooters at the scene; in fact, she had only told the police that "people from the area" had been present. The pre-trial statement would have demonstrated that Davis' testimony was, at best, fluid, uncertain and evolving over time, and arguably that she consciously lied to the jury to enhance her credibility. Individually and in combination, these instances of false testimony by Davis bolstered her credibility, and her credibility was essential to the State's case.

Finally, Petitioner maintains that the investigating police officer, Detective Graffeo, testified falsely in several respects. Most significantly, Graffeo testified that,

> [Davis] didn't have a last name on [the second shooter]. I received numerous last names,

> Jefferson, Ashcott, and different names but no one was positively sure what it was. They just knew that he hung around the area. That he didn't live there.

In fact, as revealed in the suppressed evidence, at the time of her pretrial statement Davis "had" at least two last names on the second shooter — Ascort and Caldwell — and provided them to Graffeo. Crawford was the last of three names Davis "had" for the second shooter.

More importantly, the suppressed supplemental police report, prepared by Graffeo, reveals that the very first witness to contact him identified the second shooter as "George Jefferson," and stated that Jefferson "lived in or frequented the area of 2000 Lebouef Ct." in the Fischer Project — which was the same building in which Davis lived and immediately behind the building where the shooting occurred. Although Graffeo claimed that he found "nothing concrete" when he checked out Jefferson, in fact the New Orleans Police Department had records in its files at the time showing that George Jefferson lived at the very address indicated by the caller, fit every description of the second shooter, and had an arrest for a violent crime.

Inexplicably, the Louisiana appellate court and the Fifth Circuit found no false testimony by Graffeo. Petitioner submits that this finding is clearly erroneous. The impact of Graffeo's misleading and false testimony was to bolster Davis's credibility, one of only two purported eyewitnesses, to minimize the significance of George Jefferson as an alternative suspect, and to mask the incompetence of the investigation in failing

effectively to follow up on Jefferson. Graffeo's false testimony should have been corrected. The prosecution did not do that, and the defense was not given the chance because the information showing it to be false was suppressed by the state.

This was a weak case. It was wholly dependent on the credibility of two witnesses, Mitchell and Davis, whose testimony was contradictory and, as to Davis, belied by the physical evidence. Had the jury been informed that those witnesses lied on the stand, their credibility must have been shaken to the core. Even under the *Bagley/Kyles* standard of materiality, the Fifth Circuit erred in finding that false testimony presented at Petitioner's trial, and not corrected, was not material. Under the more lenient *Napue* standard, the existence of a reasonable likelihood that the false testimony could have affected the jury's verdict cannot be doubted. This conclusion is all the more certain considering the cumulative effect of the suppressed exculpatory and impeachment materials discussed below.

### C. The Fifth Circuit Failed To Evaluate The Cumulative Impact Of Suppressed Evidence And False Testimony In The Context Of The Whole Case

In *Kyles*, this Court emphasized that "[t]he fourth and final aspect of materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." 514 U.S. at 436. The Court described the manner in which to conduct such a cumulative review:

> We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion. . . . *Id.* at 437 n.10.

The Fifth Circuit, and the Louisiana Fourth Circuit Court of Appeal before it, failed to fulfill the mandate of *Kyles* that the cumulative impact of suppressed evidence be considered in the context of the case as a whole. The Fifth Circuit notes only that the state court "quoted at length from *Kyles* and other cumulative review cases", and nowhere cites to any actual analysis of the cumulative impact. All the Fifth Circuit says is, "it is plain to us that the inquiry was conducted properly." There is simply no support for that statement.

The only assessment of the cumulative impact of the State's *Brady* and *Napue* errors evidently conducted by the Fifth Circuit itself consists of the following:

> In the end, the accounts of Davis and Mitchell were largely in line with one another and, of course, both knew Crawford personally and identified him in untainted photo arrays. Taken as a whole, the evidence does not support [Petitioner's] contention that the state court was objectively unreasonable in concluding the suppressed evidence was immaterial.

This conclusion is unsupported by the evidence, inconsistent with the mandate of *Kyles*, and wrong. The Fifth Circuit utterly failed to conduct any meaningful

analysis of the cumulative effect of suppressed evidence and false testimony in the context of the case as a whole, and its failure amounts to an arbitrary and capricious denial of due process.

### 1. The Fifth Circuit Failed To Consider Irreconcilable Differences Between The Testimony Of Mitchell and Davis, And Between Davis's Testimony And The Physical Evidence

The two accounts of the shooting by Mitchell and Davis were not "largely in line with one another," but were inconsistent in almost every important respect. Davis testified that the shooters began shooting from the porch of the housing project, more than fifty feet from where the victims were parked in the street. Mitchell testified that they started shooting just a few feet from him in the car. Both could not be true. Davis testified that the second shooter wore a blue bandana, long blue jeans and a dark-colored long-sleeve sweatshirt. Mitchell testified that the second shooter wore a light-colored T-shirt and tan or khaki colored pants, possibly shorts. Both descriptions could not be true. Davis testified that both shooters had large Uzi-type guns, about ten inches each; Mitchell testified that Larry Lindsey had a Tech 9 (similar to an Uzi), but that the second shooter had "smaller gun", a pistol. Again, both could not be telling the truth. These versions of the shooting cannot be reconciled, and the Fifth Circuit did not attempt to do so.

Even more striking is the uncontradicted fact that Davis's testimony as to where the shooters began firing was inconsistent with where the shell casings were found. The shooting simply could not have happened as she claimed. Neither the Louisiana court of appeal nor the Fifth Circuit considered this undeniable fact, which belies the very core of Davis's testimony.

The inconsistencies between the testimony of Davis and Mitchell, and between Davis's testimony and the physical evidence, reveals the State's case to have been deeply flawed. These inconsistencies should have formed the context in which the suppressed exculpatory evidence and false testimony were evaluated — both witnesses could not be believed, but both could be disbelieved. Both the state court and the Fifth Circuit failed to consider this.

### 2. The Fifth Circuit Failed To Consider The Cumulative Impact Of The Suppressed Evidence And False Testimony On The Credibility Of The Photo Identifications

A constant theme in the decisions of the state court and the Fifth Circuit is that none of the suppressed exculpatory evidence would have affected the outcome, because Davis and Mitchell both recognized Petitioner and identified his photograph. In light of their interlocking independent identifications, the argument goes, the numerous items of suppressed evidence favorable to the defense would have made no difference. Both the state court and the Fifth Circuit entirely failed to consider that, cumulatively, the suppressed exculpatory evidence would have enabled the Petitioner

to attack Mitchell's and Davis's credibility far more forcefully and directly, and to demonstrate that the photo identifications were neither independent nor credible. Furthermore, both courts failed to consider the cumulative impact on this weak case of evidence that an alternative suspect was the second shooter, and that the police investigation incompetently failed to follow up on that alternative suspect. In effect, both courts failed to consider the cumulative impact of the suppressed exculpatory evidence in the context of the case as a whole, in defiance of *Kyles* and of due process.

### a. Cumulative Impact On Mitchell's Credibility

The suppressed evidence would have shown that Mitchell originally told the police that the second shooter's gun was a "smaller caliber" than Lindsey's gun. This was contradicted by the ballistics evidence, and Mitchell massaged his trial testimony to eliminate the inconsistency. The suppressed evidence would also have revealed that Mitchell lied when he testified that he knew the second shooter's last name at the time of the shooting - a lie that made his relationship with Petitioner appear closer than it was. Finally, the total inconsistency between Mitchell's description of the second shooter's clothing and the description provided by contemporaneous callers in the 911 log would have demonstrated clearly and directly — without vouching for Davis, the only other witness against Petitioner — that Mitchell was either lying or did not see what he thought he saw.

The 911 log would have provided objective support for the argument, made without corroboration by Petitioner's counsel, that Mitchell may have believed he saw Petitioner, but did not actually see him. According to Mitchell, he was sitting in the Corvette arguing with Sheri Bailes, who was in the driver's seat, when he heard a noise behind him. Turning to look, he was hit in the head by a 9mm bullet. Only then did he see the shooters. The first he would have seen was Lindsey, who was standing immediately beside the car. In order to have seen the second shooter, he would have had to turn around more completely, because, so he testified, the second shooter was more to the rear of the car than was Lindsey. Mitchell's ability to identify a second shooter may have been seriously impaired by the fact that, after being hit in the head with the first bullet, he was hit twice more in the face, and multiple times in the body, as he fell back into the car.

Nonetheless, Mitchell identified the second shooter as Petitioner. Mitchell also claimed that the second shooter wore a light-colored shirt and tan or khaki-colored pants. The 911 log would have shown that this description was not true. Why would Mitchell give a false description? The evidence at trial suggested strongly that Mitchell's grasp of reality was tenuous at best. For instance, he testified that he never lost consciousness, and no one asked him for a description of the shooting until he had been released from the hospital. Yet the first investigating officer on the scene testified by stipulation that Mitchell was unable to speak. Just as Mitchell's mind filled in these details, the suppressed evidence would have provided compelling support for a defense argument that Mitchell's mind also filled in the identity

and clothing of the second shooter without actually seeing him.

Mitchell testified that he had known Lindsey for about a month or a month and a half, and that Lindsey "hung around" with Petitioner. Mitchell testified that he had been involved in some arguments with Lindsey and Petitioner, the most recent being two days before the shooting. He had seen Petitioner just the day before, wearing a light-colored shirt and khaki pants — the same clothing that Mitchell, but no one else, saw the second shooter wearing on the day of the shooting. Having seen Lindsey immediately before falling back into the car under a barrage of bullets, Mitchell's mind may have made the association with Petitioner, filling in what he did not actually see. And the proof that he did not see it was the 911 log. Yet, "remembering" that Petitioner was the second shooter, he identified the photograph of Petitioner shown to him by Graffeo weeks later.

"[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others. . . ." *Kyles*, 514 U.S. at 445, *citing Agurs*, 427 U.S. at 112-13, 96 S. Ct. at 2401-02. The added impeachment of Mitchell that would have been possible with disclosure of the suppressed *Brady* material and of Mitchell's false testimony could have affected the entire case, particularly because the credibility of the only other witness, Davis, was minimal or non-existent.

### b. Cumulative Impact On Davis's Credibility

The shooting could not have occurred as Davis described it, because her description is belied by the ballistics evidence. If that were not enough to establish that she did not see the shooting, the suppressed exculpatory evidence would have eliminated virtually all doubt.

The 911 log would have contradicted her characterization of the shooters' conduct after the shooting, and the sequence of her statements to the police would show that she was actively soliciting information about the second shooter wherever she could get it. The details of her story changed with each telling, right through trial — as they would if she had not actually seen the events she was describing, but was simply passing on information obtained from unknown others, whose sources and motives were themselves unknown. And the demonstrated falsity of her testimony that she told the police about other family members who supposedly witnessed the shooting would have established that Davis was willing to lie under oath.

Davis did not make the photo-identification of Petitioner until nearly two months after Mitchell's identification. Before that time, she obtained at least two other names for the second shooter — Ascort and Caldwell. Later, after she asked around the project about "the person who was the gunman," she was told his name was Crawford. She did not say who told her. Based on the sequence in which she came up with names for the second shooter, the defense could have argued that her source was Mitchell himself, or someone who heard that

Mitchell had identified Petitioner. Later, Davis was able to identify Petitioner's photograph because, as she admitted, she had already given the name to the police, she knew him from the area, and she expected to see his photograph. With the benefit of the suppressed exculpatory evidence, the defense could have argued convincingly that the two photo-identifications of Petitioner were not independent and did not reinforce each other; on the contrary, the first was a mistake, and the second flowed from the first. Neither was credible.

The suppressed evidence would also have explained Davis's motive for coming forward and making a statement — her desire for a new apartment. It is true that she claimed she had been threatened by "the perpetrators" and feared for her life, and there would have been some risk to Petitioner in eliciting this information. But the risk would have been minimal in light of evidence that (a) Davis had not actually seen what she was describing; (b) she rejected the proffered apartment because she did not want to live in the area where the offered apartment was located, suggesting that her fears were not especially keen; and (c) she refused to identify Petitioner as having threatened her. Having come forward and given her initial statement without getting what she wanted out of it, Davis could not easily renege. But she was not exactly eager to repeat the process, and did not identify Petitioner for over two months — plenty of time to find out that Mitchell had already identified him.

### c. Cumulative Impact On Plausibility Of An Alternative Suspect

Finally, the suppressed evidence would have provided the defense with a plausible alternative suspect in George Jefferson. Jefferson lived in the same building as one of the only two eyewitnesses, Davis. That building was immediately behind the building fronting on the shooting. Jefferson's name was given to the police by a woman with no apparent reason to lie or mislead, and who wished to remain anonymous. Given Jefferson's record of brazen violence, that would have been understandable. Notably, as a condition to giving her statement, Davis wanted to move from the apartment building she shared with Jefferson; after making a statement in which she did not name him, her desire to move vanished. At a minimum, the physical similarities between George Jefferson and Petitioner might have been used to cast further doubt on the doubtful veracity of the photo-identifications by Mitchell and Davis, and raise a question as to what would have happened if Jefferson's photograph had been included. Given the inherent problems with the testimony of both witnesses, the impact of this evidence cannot be overstated.

### d. The Cumulative Impact Would Have Been Decisive

This Court in *Kyles*, addressing circumstances remarkably similar to those in this case, held that the cumulative impact of the evidence suppressed by the same investigating and prosecuting agencies involved here violated *Brady*:

> [C]onfidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

514 U.S. at 454.

Here, the evidence against Petitioner was even weaker than the evidence in *Kyles*. Rather than four eyewitnesses, there were only two. The testimony of those witnesses was incompatible at its core – the descriptions of the shooting and the descriptions of the second shooter. The undisclosed evidence would have revealed pre-trial statements by each witness that were inconsistent with their testimony at trial, further damaging their credibility. There was no physical evidence implicating Petitioner in this case at all. And the investigation here, failing to pursue effectively a lead to another likely suspect, was at best insufficiently probing, while the principal police witness was at best less than candid.

Due process demands more than the cursory statement by the Fifth Circuit that, "[t]aken as a whole, the evidence does not support [Petitioner's] contention that the state court was objectively unreasonable in concluding the suppressed evidence was immaterial."

The cumulative impact analysis mandated by *Kyles* is more than a ritualistic incantation of a few prescribed words and phrases. Some actual analysis is necessary. Here, neither the state court nor the Fifth Circuit did that. Neither court considered the cumulative impact that the suppressed evidence and false testimony would have had on the ability of the defense to present a coherent attack on the credibility of the key prosecution witnesses. Neither court considered that the suppressed evidence would have enabled the defense to mount a plausible argument that the photo identifications were neither independent nor credible. Neither court considered in the context of the whole case that the suppressed evidence would have enabled the defense to present a plausible alternative suspect to the jury. Neither court considered in the context of the whole case that the suppressed evidence would have shown that the police investigation was incompetent in failing to follow up effectively on the alternative suspect. The utter failure of the state court and the Fifth Circuit to engage in any meaningful analysis of the cumulative impact of the suppressed evidence and false testimony is arbitrary and a denial of due process. Had they done so, as they were required to do, the materiality of the suppressed evidence and false testimony would have been inescapably apparent, and Petitioner's unjust conviction would have been vacated. This Court should correct the error.

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 30, 2007

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-30892

GEORGE CRAWFORD,

Plaintiff-Appellant,

v.

BURL CAIN, Warden, Louisiana State Penitentiary,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division, 2:04-CV-748.

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:*

On January 7, 1997, George Crawford ("Crawford") and Larry Lindsey were convicted by a jury of first-degree murder in Louisiana state court. Both men were

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

sentenced to life in prison without the possibility of parole. During postconviction proceedings, Crawford alleged, *inter alia,* that his conviction should be overturned because the prosecution withheld exculpatory and impeachment evidence in violation of *Brady v. Maryland* and its progeny. On February 12, 2003, the Louisiana Fourth Circuit Court of Appeal issued a lengthy opinion denying him relief. The court agreed with Crawford that the prosecution had withheld relevant material to which he was entitled, but also concluded that the undisclosed evidence was not material for *Brady* purposes. Crawford began habeas proceedings in the Eastern District of Louisiana on March 15, 2004. On July 11, 2006, the district court agreed with the state court and denied the habeas petition. On appeal, the sole question before us is whether the state court was "objectively unreasonable" in its disposition of Crawford's *Brady* claim. We find that it was not and AFFIRM.

## I. FACTS

Shortly after 2:00 PM on September 22, 1994, Elijah Mitchell and Sheri Bailes were sitting in Bailes's black Corvette near the 2000 block of Thayer Street in the Fischer Housing Project in Algiers, Louisiana. Two men approached and began shooting into the car. Bailes was shot twice and killed. Mitchell was shot many times but survived, and later proved to be a key witness at trial.

Detective Anthony Graffeo was the lead detective in the case. He received a call from Shirley Davis, a

resident of the Fischer Project, who said she witnessed the shooting. Davis told Graffeo she recognized one of the gunmen as Larry Lindsey, who was her sister's former boyfriend; the other she knew only as "George." Graffeo put together a photo array with a picture of Lindsey in it, and Davis identified him. Police arrested Lindsey on October 6, 1994, and Lindsey stated that he was not involved in the shooting, but he had heard that the perpetrator was a black male by the name of George Crawford. Based on this information, Graffeo put together a photo array with a picture of Crawford in it. The police showed that photo to Shirley Davis and Elijah Mitchell, who had recovered somewhat since the shooting. Both of them identified Crawford as the shooter. Both also provided tape recorded statements to Graffeo that were not turned over to the defense.

At trial, the prosecution's case was based almost entirely on the testimony of Davis and Mitchell, along with the photographic identifications. Lindsey and Crawford were convicted by a jury of first-degree murder and sentenced to life in prison without the possibility of parole. During his postconviction proceedings, Crawford argued to the Fourth Circuit Court of Appeal in Louisiana that the prosecution had failed to turn over exculpatory and impeachment material as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The Fourth Circuit issued a lengthy opinion that ultimately affirmed the sentence on the basis that the undisclosed evidence was not material for *Brady* purposes. *State v. Crawford*, 848 So.2d 615 (La.Ct.App.2003). Crawford then began

habeas proceedings in the Eastern District of Louisiana. The district court denied Crawford's habeas petition as to all claims, but granted a Certificate of Appealability solely as to the *Brady* claim. That appeal is now before us.

## II. STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court's decision was either (1) "contrary to ..." or (2) involved an "unreasonable application of" clearly established federal law, as determined by the Supreme Court of the United States. Crawford brings his claim only under the second standard, alleging that the Fourth Circuit unreasonably applied *Brady* and its progeny when it concluded that the undisclosed evidence was not material.

There are two ways in which a state court decision can involve an unreasonable application of the law. First, the court can identify the right legal rule but apply it unreasonably to the facts of a case, and second, the Court can unreasonably extend a legal principle to a new and inappropriate context, or unreasonably refuse to extend it to a context where it should apply. *Williams v. Taylor*, 529 U.S. 362, 405-07, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under this standard, we should only grant the writ when the state court's decision was erroneous and "objectively unreasonable." *Id.* at 409-11. In conducting this inquiry, we review the federal district court's findings of fact for clear error and its conclusions of law *de novo*. *Thompson v. Cain*, 161 F.3d 802, 805 (5th Cir.1998) (citations omitted).

*Appendix A*

## III. DISCUSSION

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. To establish a *Brady* claim, a petitioner must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the petitioner, and (3) the evidence was material. *Kyles,* 514 U.S. at 432-34 (1995); *Spence v. Johnson,* 80 F.3d 989, 994 (5th Cir.1996) (citation omitted). "Favorable" evidence includes that which is exculpatory and that which could be used to impeach a prosecution witness. *United States v. Bagley,* 473 U.S. 667, 676-77, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

The test for materiality is "whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different." *United States v. Sipe,* 388 F.3d 471, 485 (5th Cir.2004) (internal quotation omitted); *see also Kyles v. Whitley,* 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (citations omitted). Evidence may be material under *Brady* even when it is not admissible, provided that it satisfies the same test. *Sipe,* 388 F.3d at 485. The Supreme Court has identified four aspects of the materiality inquiry. First, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

*Kyles*, 514 U.S. at 434. Second, the materiality inquiry is "not a sufficiency of the evidence test." *Id.* Rather, the reviewing court should ask whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. Third, if the evidence is material, there is no need for a harmless error analysis. *Id.* Finally, though the court may have to go over each piece of evidence item by item, it must ultimately evaluate the cumulative effect of the evidence for purposes of materiality. *Id.* at 436.

*A. Whether or not the suppressed evidence was favorable to Crawford*

There is no dispute that the prosecution did suppress evidence. It remains, however, for Crawford to show that the evidence was (a) favorable to his defense, and (b) material. Both the state court and the district court readily concluded that much of the suppressed evidence would have been favorable to Crawford's defense, and we agree. There are four separate documents that contained exculpatory or impeachment evidence. These include: (1) a supplemental police report; (2) Shirley Davis's pretrial statement; (3) Elijah Mitchell's pretrial statement; and (4) the 911 log. We summarize the relevant contents of those documents here before turning to the question of materiality.

## *Appendix A*

### *1. The Supplemental Police Report*

The supplemental report contained three favorable statements: (1) When Shirley Davis initially called police, she stated that the perpetrators were Larry Lindsey and George *Ascort;* (2) Davis also told police "she would come forward and give a statement only if she could be relocated from the Fisher Housing Project," because the perpetrators had threatened to kill her; and (3) On the morning after the shooting, an anonymous caller told Graffeo that the second shooter's name was possibly George *Jefferson,* and that he lived on the 200 block of LeBoeuf Court in the Fisher Project. The first of these statements would have conflicted with Davis's trial testimony that she did not know George's last name at the time of the shooting or when she first spoke to police. The second suggests bias, and thus fabrication. The third presents the possibility of a different shooter altogether.

### *2. Shirley Davis's Pretrial Statement*

At least two portions of Davis's pretrial statement were favorable to Crawford. First, Davis said she knew George's name to be George *Caldwell,* which is inconsistent with both her trial testimony and her first statement to Graffeo. Second, her description of the shooters' clothing was different from what it was at trial. In her statement she told police that Lindsey was wearing a dark colored shirt, while George was wearing a purple and white long-sleeve shirt with a hood, but at trial the descriptions were effectively switched. There

were other minor inconsistences, or possible inconsistencies, as well.[1]

*3. Elijah Mitchell's Pretrial Statement*

Two excerpts of Mitchell's pretrial statement are at least somewhat favorable to Crawford. First, the statement reveals that Mitchell did *not* know George's last name at the time of the shooting, which is plainly inconsistent with his trial testimony. Second, his statement that Lindsey used a 9 mm gun, while George used a "small caliber gun" might have been used to impeach Mitchell because evidence revealed the guns were actually the same type.

*4. The 911 Log*

Two portions of the 911 log were favorable to Crawford. First, one caller described a perpetrator as wearing a "multi-striped hooded shirt." Another stated that the two wore "a multicolor shirt and green pants" and "a colorful shirt and black jeans," respectively. This evidence is inconsistent with Mitchell's testimony that the second shooter wore a light colored shirt and tan

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1. For instance, in the pretrial statement Davis states that "you couldn't really tell [the perpetrators] had guns on them when they first got out of the car," but at trial she said that the shooters did have guns in their hands when they got out of the car. Also, there is also a possible inconsistency in Davis's pretrial statement that she went up to the car and observed the victims after the shooting was over, and her testimony at trial that she went immediately inside.

pants. Second, the one caller said the shooters ran after the shooting, which is inconsistent with Davis's testimony that the shooters walked away from the scene.

*B. Whether the favorable evidence was material*

Having reviewed the favorable evidence, we must now consider whether the evidence satisfies the Supreme Court's test for materiality. It is clear to us that none of this evidence, standing alone, would have been sufficient to undermine confidence in the jury's verdict. However, as has already been stated, we must consider the materiality of the evidence *cumulatively,* in light of the record as a whole. *Kyles,* 514 U.S. at 436-37.

*1. The Impeachment of Elijah Mitchell*

The state court readily found the impeachment evidence immaterial as to Mitchell. Mitchell's statement that he knew Crawford's last name at the time of the crime was inconsequential in light of his testimony that he had known Crawford for over a month, and his ability to identify him in an untainted photo array. Similarly, Mitchell's statement about the size of the guns was immaterial because the jury knew there was an inconsistency between his account of the guns and Davis's account of the guns. Mitchell testified at trial that Crawford had a small gun and Lindsey did not, while Davis testified that both guns were "big." Any other inconsistencies between the testimony of Mitchell and Davis, or between Mitchell's testimony and the physical evidence, were aired at trial and thus fully presented to

the jury. We cannot say that the state court's conclusions were objectively unreasonable.

*2. The Impeachment of Davis*

Crawford argues that Davis's real motivation for testifying was to obtain new housing, and notes that she changed George's last name several times over the course of the investigation. The state court considered these arguments at length but ultimately found them unavailing. First, the court found that any evidence of bias would have done Crawford more harm than good because it would have opened the door to evidence that Davis had been threatened by the assailants.[2] Furthermore, the court noted that Davis subsequently declined the offer of new housing long before trial, but nonetheless proceeded to testify against Crawford as planned, which seriously undercuts its value as impeachment evidence. For those two reasons, then, the state court found that the suppressed evidence of bias was immaterial, and we cannot say that this conclusion was objectively unreasonable.

As to the many inconsistencies in Davis's various statements over time, including and especially the changes in George's last name, the state court concluded that any inconsistency was illusory. The jury did not know that Davis gave two incorrect names, but it did

2. In fact, the trial court granted Lindsey's motion to preclude any mention of threats on that very basis, and specified that if the defense mentioned the housing switch to show bias, that would open the door to evidence of threats.

hear that Davis did not know George's last name at the time of the shooting. According to the state court, the difference between the two, if any, is minor, and means very little in light of the fact that she successfully identified Crawford in the photo array. Again, whether or not we agree with that conclusion, we surely cannot say it is objectively unreasonable. The same holds true for the other minor inconsistencies in Davis's testimony, such as her transposed descriptions of the perpetrators' clothing, or the differing versions in the 911 log. These inconsistencies do not affect Davis's credibility so much as to undermine confidence in the verdict.

*3. George Jefferson*

Crawford claims that the anonymous tipster's identification of a "George Jefferson" would have allowed the defense to point the finger at another suspect, and to illustrate that the police investigation was sloppy and unreliable. Graffeo did follow up on the lead, but found no "concrete information." 848 So.2d at 630. A "George Jefferson" did in fact live in or near the housing projects where the shooting occurred, but that name did not surface again after the very early stages of the investigation. The state appellate court found this omission immaterial because the jury "was aware that the police had the names of several Georges," *id*. at 631, particularly early on in the investigation, and while Davis and Mitchell were unsure of the last name, they both

positively identified Crawford, whom they had known for some time. This conclusion was not objectively unreasonable.[3]

*4. Cumulative Impact*

Finally, Crawford suggests that the state court did not evaluate the evidence cumulatively. He relies largely on the fact that the court did not specifically quote the relevant language from *Kyles* on the question of cumulative impact. 514 U.S. at 436-37. We are not persuaded. The state appellate court cited the relevant excerpts from *Brady* and quoted at length from *Kyles* and other cumulative review cases. Though the court did not cite the precise language we have to signal its cumulative review, it is plain to us that the inquiry was conducted properly. In the end, the accounts of Davis and Mitchell were largely in line with one another and, of course, both knew Crawford personally and identified him in untainted photo arrays. Taken as a whole, the evidence does not support Crawford's contention that the state court was objectively unreasonable in concluding that the suppressed evidence was immaterial.

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3. Crawford makes an additional argument in his brief that he might have been able to impeach Graffeo if he had had access to the Supplemental Report and Davis's pretrial interview. In so doing, however, Crawford misreads Graffeo's testimony to create inconsistencies where there are none. We find this argument unpersuasive and unsupported by the record.

## V. CONCLUSION

There is no doubt that the state failed to turn over to Crawford favorable evidence to which he was entitled. Nevertheless, the state court thoroughly considered whether the suppressed evidence was material according to the guidelines provided by the Supreme Court. For the reasons stated above, we cannot say that the state court's conclusions were objectively unreasonable, and we therefore AFFIRM the district court's denial of the petition.

## APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED JULY 11, 2006

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

CIVIL ACTION

NO. 04-0748

SECTION "R" (6)

GEORGE CRAWFORD

VERSUS

BURL CAIN, WARDEN

**ORDER AND REASONS**

Before the Court are petitioner George Crawford's objections to the magistrate judge's Report and Recommendation denying his application for a writ of habeas corpus. For the following reasons, the Court accepts the magistrate judge's Report and Recommendation and DENIES Crawford's application for habeas relief.

### I. FACTUAL AND PROCEDURAL BACKGROUND

Shortly after 2:00 p.m. on September 22, 1994, Elijah Mitchell was sitting in his girlfriend Sheri Bailes's black

Corvette near the 2000 block of Thayer Street in the Fischer Housing Project in Algiers, Louisiana. Two men approached and began shooting into the car. Bailes was shot twice and was pronounced dead at the Medical Center of Louisiana at 3:10 p.m. Mitchell was shot a number of times, but he eventually recovered.

Detective Anthony Graffeo of the New Orleans Police Department arrived at the scene and discovered an area of Thayer Street spread with broken glass, eight spent nine millimeter shell casings, one live nine millimeter round, and a black and white baseball hat with a bullet hole through its peak. The hat was later identified as the hat Mitchell was wearing at the time of the shooting. Ballistics tests later showed that the casings had been ejected from two different guns.

About 270 feet down the street, Detective Graffeo found Bailes's black Corvette off the road, canted into the bushes. The T-top of the Corvette was down, the back windshield was broken out, and there was one spent nine millimeter casing in the passenger side of the car. Blood covered both the driver's and passenger's seats. A white rock, which was later determined to be cocaine, was wrapped in cellophane on the front seat. The police searched the scene and canvassed the neighborhood but were unable to find any weapons or any witnesses willing to give a statement.

The next day, Detective Graffeo received a call from Shirley Davis, a resident of the Fischer Housing Project who said she witnessed the shooting. Davis told Graffeo

that she recognized one of the gunmen as Larry Lindsey, who was her sister's former boyfriend; the other she knew only as "George." With the name Larry Lindsey, Detective Graffeo was able to compile a photo array, from which Davis identified Lindsey. Davis also gave a tape recorded statement, which was not disclosed to the defense before trial. Based on Davis's identification, a warrant was issued for Lindsey's arrest. Lindsey was arrested on October 6, 1994. When Lindsey was arrested, he stated that he was not present at the time of the shooting but that he had heard that the perpetrator was a black male by the name of George Crawford. Based on this information, Graffeo compiled a photo array that included a picture of George Crawford.

By October 6, 1994, Elijah Mitchell had recovered enough to be interviewed by the police. Mitchell told police that he had seen both gunmen during the shooting and that he knew both of them. He identified pictures of Larry Lindsey and George Crawford from the photo arrays that Detective Graffeo presented to him. Based on Mitchell's identification, an arrest warrant was issued for George Crawford. Mitchell also gave the police a tape-recorded statement, which was not disclosed to the defense before trial.

On December 1, 1994, Detective Graffeo's partner, Detective Gary Marchese, presented Shirley Davis with another photo array. At that time, Davis identified George Crawford as the second shooter.

*Appendix B*

On June 1, 1995, Larry Lindsey and George Crawford were charged with the first-degree murder of Sheri Bailes. Both men pleaded not guilty. The case went to trial on January 7, 1997. There was no physical evidence tying Lindsey or Crawford to the crime, and the prosecution based its case principally on the testimony of Shirley Davis and Elijah Mitchell, as well as their pretrial photographic identifications of Lindsey and Crawford. Their trial testimony was as follows.

Shirley Davis testified that on September 22, 1994, she lived at 1020 LeBoeuf Court, Apartment 1C, in the Fischer Housing Project. As she was parking her car in the driveway that afternoon, she noticed a car behind her. She recognized the car's occupants as Larry Lindsey and a person she had seen before in the project, but knew only as George. She said she had known Lindsey a long time and that he used to see one of her sisters, with whom he had a child. She said that she had seen George around the project for a couple of months.

Davis testified that both men had bandanas over their mouths and had large guns in their hands. She testified that Lindsey wore a purple hooded sweatshirt and long blue jeans and that George wore a long-sleeve dark sweatshirt and jeans. She watched the men go through a breezeway between two buildings toward Thayer Street, and she then heard her mother yelling for her from the other side of the breezeway, along with several gunshots. As Davis moved toward the breezeway, she could see the men shooting and at some point she came to a position to see that the shooting was aimed at

two people in a black Corvette. The Corvette ended up in the grass by a fence. She then saw the two shooters walk back through the breezeway to their car, back up, and leave. Davis testified that she then went inside her apartment.

Davis also testified that her aunt, who was with her in her car when she arrived, her mother, and several of her cousins, who were shooting dice in the breezeway, also witnessed the shooting, but did not talk to police. Davis testified that she spoke with police the next day and told them that Larry Lindsey was one of the perpetrators and that the other was named George, but that she did not know his last name. She confirmed that she picked Larry Lindsey out of the photo array and said that the police did not promise her anything for doing so. She also confirmed that several months later she picked George Crawford's picture out of a second photo array and said that, by that time, she had found out from other people in the project that his last name was Crawford. She also stated that she picked Crawford out of the photo array without being promised anything by the police for doing so.

Mitchell, who was serving a sentence in Texas state prison for a probation violation at the time of trial, testified at trial that he had gotten into Bailes's car shortly before the shooting. Bailes was sitting in the driver's seat, Mitchell was sitting in the passenger seat, and the two were facing each other, arguing. Mitchell noticed that someone was walking toward the car on the passenger side. As Mitchell turned around to see who it

was, he was shot in the right side of the head. Mitchell testified that then he turned around completely and saw that the gunmen were Larry Lindsey and George Crawford. Mitchell stated that Lindsey had a black bandana over his mouth, wore dark blue shorts and a black sports jersey, and was armed with a Tek-9. Crawford, who Mitchell said was not wearing a bandana over his mouth, had on a light colored shirt and either tan or khaki pants, the length of which Mitchell could not recall. He said that Crawford was armed with a smaller weapon. Mitchell was shot several more times, including twice in the face. At some point during the shooting, Bailes apparently depressed the accelerator, and the car drove forward 30 or 40 yards and rolled off the road.

Mitchell testified that he was able to recognize both men because he had known them for about a month or a month and a half and had been in several arguments with them. He said that Crawford and Lindsey lived together around the block from him in Gretna. He also testified that Lindsey and Crawford had threatened him after a confrontation two days before the shooting. He testified that whenever he saw Lindsey, Crawford was with him. Mitchell confirmed that he had identified both men in photo arrays that the police presented to him on October 6, 1994.

At trial, the defense presented a single witness, an investigator who testified that the distance from the edge of breezeway to where Bailes's car was when the shooting took place was 53 feet. Crawford and Lindsey were

convicted of first-degree murder. The next day, both men were sentenced to life in prison without the possibility of parole.

Crawford appealed his conviction. On March 10, 1999, the Fourth Circuit Court of Appeal affirmed the conviction and life sentence in an unpublished opinion. *State v. Lindsey,* 737 So.2d 978 (La.Ct.App.1999). On October 15, 1999, the Louisiana Supreme Court denied Crawford's writ application. *State v. Lindsey,* 748 So.2d 463 (La.1999).

Crawford applied for post-conviction relief in the state trial court on October 12, 2000. The trial court denied relief on July 11, 2002, and Crawford timely filed notice of intent to seek writs. The Louisiana Fourth Circuit Court of Appeal denied post-conviction relief on February 12, 2003. *State v. Crawford,* 848 So.2d 615 (La.Ct.App.2003). Crawford timely requested rehearing, which was denied on March 14, 2003. On April 14, 2003, Crawford filed a writ to the Louisiana Supreme Court, which was denied on March 12, 2004. *State v. Crawford,* 869 So.2d 815 (La.2004).

On March 15, 2004, Crawford filed a petition in this Court for a writ of *habeas corpus.* Crawford asserts three claims: (1) that the evidence at trial was insufficient to support his conviction; (2) that he was denied due process because the prosecution withheld from the defense material exculpatory and impeachment evidence; and (3) that he was denied effective assistance of counsel at trial. The State argues that Crawford's habeas application is

untimely and that, in any event, his claims should be denied on the merits. The magistrate judge reviewing Crawford's federal habeas petition determined that Crawford's petition was timely but that it should be dismissed on the merits. Crawford objects to the magistrate's report and recommendation that his petition be dismissed.

## II. TIMELINESS

Congress enacted a strict statute of limitations for *habeas corpus* proceedings as part of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (effective April 24, 1996). Under the AEDPA, "[a] 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The one-year period runs from the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Direct review includes a petition for certiorari to the United States Supreme Court. *Foreman v. Dretke*, 383 F.3d 336, 338 (5th Cir.2004) (citing *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir.2003)). If no such petition is filed, then the conviction becomes final when the time for seeking direct review expires. *Foreman*, 383 F.3d at 338. If a defendant has pursued his direct appeal through the highest state court, the time for seeking direct review includes the 90 days for filing a petition for certiorari to the Supreme Court. *Id.* If not, then it includes only the time for seeking further state-court direct review. *Id.*

Here, Crawford's conviction was on direct review in the state courts until October 15, 1999, when the Louisiana Supreme Court denied his writ application. Crawford did not file a petition for review in the United States Supreme Court, so his conviction became final 90 days later, on January 13, 2000.[1] Thus, the one-year statute of limitations expired on January 13, 2001, and Crawford's federal *habeas* petition, which he filed in this Court on March 15, 2004, is untimely unless the limitation period was statutorily or equitably tolled.

AEDPA's one-year statute of limitations is statutorily tolled for the period of time during which a properly filed application for state post-conviction relief or other collateral review of the judgment under which the petitioner is incarcerated is pending. 28 U.S.C. § 2244(d)(2); *see Moore v. Cain*, 298 F.3d 361, 365-67 (5th Cir.2002). Crawford did not file an application for state post-conviction relief until October 12, 2000, so 272 days of his 365-day limitation period elapsed. Crawford's properly filed application for post-conviction relief tolled the statute of limitations from October 12, 2000 to March 12, 2004, when the Louisiana Supreme Court denied his writ application.[2] Only three more days passed before

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1. The State's argument that Crawford's petition is untimely relies in part on its failure to include this 90-day period.

2. In its response to Crawford's petition, the State argued that Crawford's writ application to the Louisiana Supreme Court was untimely. If the state is correct, then Crawford's petition would be untimely, because the AEDPA's one-year limitations

(Cont'd)

Crawford filed his federal *habeas* petition. Accordingly, the Court finds that Crawford's federal *habeas* application is timely and proceeds to consider the merits of his claims.

## III. DISCUSSION

The state courts rejected Crawford's post-conviction application for relief on the merits. *See State v. Crawford*, 848 So.2d 615 (La.Ct.App.2003). Under AEDPA, a state court's findings of fact are entitled to a presumption of correctness, rebuttable only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). A federal *habeas* court may not grant a state prisoner's application for a writ of

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(Cont'd)

period is not tolled during the pendency of an untimely application for post-conviction relief in the state courts. *See Pace v. DiGuglielmo*, 544 U.S. 408, 414, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). In this case, Crawford had until April 13, 2003 to file his writ application with the Louisiana Supreme Court. Although he did not file his application until April 14, 2003, as the magistrate judge noted, April 13, 2003 was a Sunday. Under Louisiana law, petitioner had until the next business day, April 14, 2003 to file his writ application. *See Lambert v. Mutual Life Ins. Co. of New York*, 431 So.2d 23, 24 (La.Ct.App.1983) ("It is well settled in Louisiana that when the last day of the term by law for taking any stated action in a judicial proceeding falls on a Sunday or other legal holiday, the action may be taken on the next day following, as effectively as if taken on the day before the last day of the term.") (citing *Mansur v. Abraham*, 183 La. 634 164 (1935)). Accordingly, Crawford's writ application was timely filed. The State has not objected to the magistrate judge's ruling on this point.

*habeas corpus* with respect to claims adjudicated on the merits in state court unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). This section provides two potential avenues for relief: the petitioner must show that the state court construction was either "contrary to" federal law or an "unreasonable application" of it.

A state court decision is "contrary to" clearly established federal law if: (1) the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

A state court decision involves an "unreasonable application" of clearly established federal law if: (1) "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407-08. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly

established federal law was objectively unreasonable," not just incorrect or erroneous. *Id.* at 409-11. Accordingly, the Court must determine whether the Louisiana state court misapplied a federal standard or whether the court's decision that Crawford did not demonstrate constitutional error is an objectively unreasonable legal conclusion.

### A. Sufficiency of the Evidence

Crawford argues that the evidence presented at trial was insufficient to support his conviction. In evaluating a petitioner's challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (citation omitted). In making this determination, the Court must resolve all credibility issues in favor of the prosecution. *See Ramirez v. Dretke,* 398 F.3d 691, 695 (5th Cir.2005) (citing *United States v. Cyprian,* 197 F.3d 736, 740 (5th Cir.1999)). When, as in this case, a state appellate court has reviewed the sufficiency of the evidence, that court's opinion is entitled to great weight. *See Parker v. Procunier,* 763 F.2d 665, 666 (5th Cir.1985) (citing *Jackson,* 443 U.S. at 310, n. 15); *see also Duff-Smith v. Collins,* 973 F.2d 1175, 1184 (5th Cir.1992). Indeed, as indicated above, the AEDPA presumes the correctness of state court findings of fact, and places a "clear and convincing" burden on the petitioner who attempts to rebut that presumption. *See* 28 U.S.C. § 2254(e)(1).

*Appendix B*

Crawford argues that Davis's and Mitchell's stories were so contradictory that their testimony was "mutually exclusive" and the jury thus "had no choice except to believe one version of the shooting or the other." Crawford further asserts that no rational jury could have convicted him based solely on the testimony of either Davis or Mitchell, so the state court's determination that the evidence adduced at trial was sufficient to support his conviction was an unreasonable application of federal law.

The state court's decision was not an objectively unreasonable application of federal law. The state court applied the correct legal standard, analyzed the testimony of Davis and Mitchell, and concluded that their testimony was not mutually exclusive. *Crawford,* 848 So.2d at 623. The court found that the jury was entitled to credit Davis's and Mitchell's testimony that George Crawford was one of the shooters, and that this evidence was sufficient to convict, notwithstanding that their testimony was not entirely consistent. *Id.* The Court cannot conclude that this was an unreasonable application of *Jackson.* A rational jury presented with testimony from two eyewitnesses who differ with respect to certain details need not resolve the conflict by adopting wholesale the testimony of one witness and rejecting entirely the testimony the other. The jury was entitled to credit both witnesses' identification of Crawford as one of the shooters. Accordingly, Crawford is not entitled to relief on this claim.

**B. *Brady* Claim**

Crawford next argues that the state violated his right to due process when it failed to disclose material favorable evidence before trial that would have permitted him to impeach the prosecution's witnesses, question the thoroughness of the police investigation, and establish a possible alternative suspect for the crime.

In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court has since abandoned any requirement that a defendant request the disclosure of favorable evidence, and the *Brady* standard now applies regardless of whether the defendant specifically requests the information. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). To establish that the state's failure to disclose evidence violates *Brady*, a petitioner must demonstrate that: (1) the prosecution withheld evidence; (2) the evidence is favorable to the accused; and (3) the evidence is material to guilt or punishment. *Bagley*, 473 U.S. at 674. Evidence "favorable to an accused" for the purposes of *Brady*'s second prong is not limited to evidence that is exculpatory. Evidence that could be used to impeach a prosecution witness also falls within *Brady*'s disclosure

requirement. *Id.* at 676-77; *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir.1999). Evidence may be material under *Brady* even if it is not admissible. *See United States v. Sipe*, 388 F.3d 471, 485 (5th Cir.2004) ("When assessing the materiality of inadmissible evidence, we apply the general *Brady* test and 'ask only . . . whether the disclosure of the evidence would have created a reasonable probability that the result of the proceeding would have been different.' ") (quoting *Felder*, 180 F.3d at 212) (ellipsis in original).

Undisclosed favorable evidence is material under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (citation omitted). In *Kyles*, the Supreme Court identified four key aspects of the *Brady* materiality inquiry. First, to show materiality, the defendant need not demonstrate by a preponderance of the evidence that disclosure of the withheld evidence would have resulted in acquittal. *Id.* at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Second, the materiality determination "is not a sufficiency of evidence test." *Id.* The relevant inquiry is not whether the inculpatory evidence, discounted in light of the undisclosed evidence, would still have been enough to convict, but whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

*Id.* at 435. Third, if the withheld evidence is material, there is no need to conduct a harmless-error analysis. *Id.* at 435-36. Finally, the withheld evidence must be considered collectively, not item-by-item. *Id.* at 436. Although a court must consider "the tendency and force of the undisclosed evidence item by item," it should evaluate the evidence's "cumulative effect for purposes of materiality." *Id.* at 436 n. 10.

There is no dispute that the defense made a targeted request for potential *Brady* material, and the prosecution did not disclose the following items to the defense: (1) a supplemental police report prepared by Detective Graffeo (Petr.'s Ex. A, Vol. 2, Tab D, Foker Aff., Ex. B. (*hereinafter* "Foker Aff."); (2) the transcript of a pretrial statement given by Shirley Davis on September 23, 1994, *Id.* Ex. H; (3) the transcript of a pretrial statement given by Elijah Mitchell on October 6, 1994, *Id.* Ex. K; (4) a log of 911 calls reporting the shooting, *Id.* Ex. C; and (5) Mitchell's medical records from the day of the shooting, *Id.* Ex. L. Crawford did not object to the Magistrate's ruling that the state court correctly found the medical report immaterial. Accordingly, this argument is waived. The Court must now analyze the state court decision under the constitutional standards discussed above. In reaching its decision, the Court has reviewed the trial transcript, all of the undisclosed evidence, and other parts of the 14 volume record.

*Appendix B*

1. *Favorable to the Accused*

a. *The Supplemental Police Report*

Crawford identifies three purportedly favorable statements from Detective Graffeo's supplemental police report that he claims should have been disclosed to the defense: (1) that when Shirley Davis initially called the police, she stated that the perpetrators were Larry Lindsey and George *Ascort;* (2) that Shirley Davis stated that "she would come forward and give a statement only if she could be relocated from the Fisher Housing Project"; and (3) that, on the morning after the shootings, an anonymous caller informed Detective Graffeo that the second shooter's name was possibly George *Jefferson,* and that he lived in or frequented the 2000 block of LeBoeuf Court, in the Fisher Project. (*See* Foker Aff. Ex. B, at 13)

Pretermitting for the moment any consideration of whether these undisclosed statements are material, each statement is favorable to Crawford. Shirley Davis' initial statement identifying George Ascort as the second shooter could have been useful to attempt to undermine her statement at trial that she did not know George's last name at the time of the shooting or when she first spoke to police. (*See* State Ct. R., Vol. 3 of 5, Trial Tr. at 110, 115, 120-22). That Davis asked to be relocated to another neighborhood before she was willing to give a statement could have been used by the defense to attempt to establish that Davis had a motive to fabricate

her statement that she saw the shooting.[3] Finally, that another person identified the George involved with the shootings as George Jefferson is clearly favorable to the accused. Thus, each of the complained-of statements in the supplemental police report satisfies the first prong of the *Brady* inquiry.

b. *Shirley Davis's Pretrial Statement*

Crawford asserts that a number of statements that Shirley Davis made in her initial statement to police would have been useful to impeach her credibility at trial.

First, Crawford states that although Davis testified at trial that she did not know George's last name when she first met with the police,[4] she gave the police the name George *Caldwell* during her initial interview. (*See* Foker Aff. Ex. H, at 7). As with Davis's statement identifying a George Ascort, this statement could have been used in an effort to impeach Davis's trial testimony, and it could also have been used to attack Detective Graffeo's testimony at trial that Davis "didn't have a last name" on the second shooter at the time she was interviewed. (*See* Trial Tr. at 48). Accordingly, the statement is favorable to Crawford.

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3. Crawford also argues that Davis's request that she be relocated is favorable because it could be used to show that Davis gave perjured testimony at trial. The Court discusses this argument *infra*.

4. (*See* Trial Tr. at 115, 119-20).

Second, Crawford notes that Davis provided conflicting descriptions of the perpetrators' clothing in her pretrial statement and her trial testimony. In her initial meeting with police, Davis stated that Larry Lindsey was wearing a dark colored shirt and George was wearing a purple and white long-sleeve shirt with a hood at the time of the shooting. (*See* Foker Aff. Ex. H, at 2, 7). At trial, however, Davis testified that Larry Lindsey was wearing the purple, hooded sweatshirt and that George Crawford wore a dark, long-sleeve sweatshirt. (*See* Trial Tr. 139-40). This inconsistency as to who wore what at the time of the shooting is also favorable to the defense under *Brady.*

Third, Crawford states that Davis's trial testimony that the shooters had guns in their hands when they got out of the car[5] contradicts her pretrial statement that "you couldn't really tell they had guns on them when they first got out the car." ( *See* Foker Aff. Ex. H, at 3). These statements do not necessarily conflict with one another. Davis's pretrial statement, when read in context, suggests that the shooters had the guns in their hands as they exited the car, but that they carried the guns in a manner intended to not attract attention until they got through the breezeway: "[Y]ou *couldn't really* tell they had guns on them when they first got out the car . . . and when they went through the breeze-way they *up with the guns* and ran up on the car and started shooting." *Id.* (emphasis added). Although this Court harbors some doubt as to whether these two statements actually

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5. (*See* Trial Tr. at 110).

conflict, and whether Davis' pretrial statement is therefore favorable evidence under the first prong of *Brady*, the state court appears to have found that the statements conflicted, but that the conflict would not have affected Davis' credibility. *See Crawford*, 848 So.2d at 629 ("The . . . discrepanc[y] concerning . . . whether the guns were in the perpetrators' hands as they exited their car [is a] distinction[ ] that would not harm her credibility."). The Court defers to the state court's factual finding that there was some inconsistency between the two statements and finds that this statement satisfies the first *Brady* prong.

Fourth, Crawford asserts that Davis's pretrial statement and her trial testimony about the shooting itself were different. Specifically, Crawford states that, in her pretrial statement, Davis said that she saw the perpetrators run up on the car and start shooting,[6] while at trial she said that she saw them start shooting when they reached the end of the breezeway, but that she did not see initially at what they were shooting. (Trial Tr. at 112). Crawford also asserts that Davis initially stated that she saw Bailes's car swerve into the grass,[7] but that her trial testimony forecloses such a possibility. As the magistrate judge correctly found, however, Davis' pretrial statement and her trial testimony concerning the sequence of events during the shooting were "essentially in sync." (R. Doc. 13, at 26-27). Davis stated

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6. (*See* Foker Aff. Ex. H, at 3).

7. (*See* Foker Aff. Ex. H, at 4).

both in her pretrial statement and at trial that the perpetrators started shooting from the breezeway. (*See* Foker Aff. Ex. H, at 4 ("They both was like, you know where the breeze-way at, they was like right there."); Trial Tr. at 112 ("When they got to the front [of the breezeway] that's when they had started shooting."); Trial Tr. at 145 ("They came up off the porch.")). Moreover, contrary to Crawford's a assertions, Davis testified at trial both that there came a time when she was in a position to see what the perpetrators were shooting at and that she saw that Bailes's car wound up in the grass:

> Q. Now, did there come a time when you got a position to see where the shooting was aimed at? Could you see what was being shot?
>
> A. Yes.
>
> Q. Okay. And what was being shot?
>
> A. Two people in a black Corvette.
>
> Q. Okay. Did you see where that Corvette ended up?
>
> A. Yes, in the grass by the fence.

(Trial Tr. at 113). Thus, the magistrate judge was correct that Davis's pretrial statements about the sequence of events during the shooting do not constitute evidence favorable to Crawford.

Fifth, Crawford argues that Davis's testimony that her aunt was with her at the time of the shooting and that some of her cousins were among the people who were in the breezeway at the time of the shooting[8] contradicted her pretrial statement that there was just "[a] crowd of people from the area" present when the shooting took place. (*See* Foker Aff. Ex. H, at 8). The state court found that Davis's pretrial statement was favorable to the defense because it implied that she did not know any of the other witnesses, but that the contradiction was nonetheless immaterial to Davis's credibility. *See Crawford,* 848 So.2d at 629. The Court finds no reason to depart from the state court's determination that this part of Davis's pretrial statement contradicted her testimony at trial and was favorable to the defense.

Sixth, Crawford asserts that before trial, Davis stated that she went up to the car and observed the victims after the shooting was over,[9] while at trial she stated that she immediately went inside after the shooting. (*See* Trial Tr. at 114). It is not clear that Davis's statement at trial that she went inside immediately after the shooting implies that she did not later come outside and observe the car after the perpetrators had left the scene. Still, this arguable inconsistency could have been potentially useful for defense counsel's cross examination of Davis and is therefore favorable to Crawford.

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8. (*See* Trial Tr. at 111, 132).

9. (*See* Foker Aff. Ex. H, at 4).

Finally, Crawford argues that Davis's pretrial statement that she observed Elijah Mitchell "gasping for breath" and unable to speak after the shooting,[10] could have been used to undermine Mitchell's testimony that he would have been able to give a statement to police when they arrived on the scene. What Davis actually said was that she saw Mitchell "gasping for breath and trying to say something out his mouth."[11] What Mitchell said at trial was that he was conscious, and no one asked him for a statement.[12] He did not say that he could have given a statement. Davis's statement that Mitchell was "trying to say something out his mouth" is consistent with Mitchell's testimony that he was conscious after the shooting. This statement is not *Brady* material.

*c. Elijah Mitchell's Pretrial Statement*

Crawford also argues that Elijah Mitchell's initial statement to police contained a number of statements that could have been used to impeach his testimony at trial. As with Davis's statement, the Court considers each of Crawford's arguments in turn.

First, Crawford argues that, although Mitchell testified at trial that he knew George's last name at the

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10. (*See Id.*).

11. *Id.*

12. (*See* Trial Tr. at 95).

time of the shooting,[13] the transcript of his pretrial statement shows that he said he did not know George's last name. (*See* Foker Aff. Ex. K, at 3) ("I don't know George['s] last name. . . ."). This portion of Mitchell's pretrial statement was favorable to Crawford, as it conflicts with Mitchell's trial testimony.

Second, Crawford argues that Mitchell's trial testimony that the two perpetrators shot him from the side, not the rear, of Bailes's car[14] conflicts with his initial statement to police. In his recorded pretrial statement, Mitchell stated that Larry Lindsey was "straight outside" the passenger door of the car, to Mitchell's east, while "George was more like . . . as he was to the east he was like to the south," farther toward "the rear of the vehicle." (*See* Foker Aff. Ex. K, at 5). But, as the state court noted, although Mitchell's pretrial statement places George closer to the rear of the vehicle than Larry Lindsey, it still places him on the passenger side, and the statement does not therefore conflict with Mitchell's trial testimony. *See Crawford*, 848 So.2d at 626. Accordingly, this statement does not constitute evidence favorable to the defense.

Third, Crawford asserts that Mitchell's pretrial statement that Lindsey used a 9mm gun and the second shooter used a "small caliber gun"[15] could have been used

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13. (*See* Trial Tr. at 81).

14. (*See* Trial Tr. at 89).

15. (*See* Foker Aff. Ex. K, at 4).

to impeach Mitchell's trial testimony, because the ballistic evidence established that both weapons involved in the shooting were 9mm. Although the state court correctly found that Mitchell's pretrial statement about the small caliber gun did not actually conflict with his trial testimony, the state court failed to consider whether the statement could have been used to impeach the accuracy of Mitchell's recollection, because the prosecution's ballistics evidence foreclosed the possibility that one of the shooters used a small caliber weapon. The statement is favorable to the defendant for this purpose.

d. *The 911 Log*

Crawford argues that the prosecution also should have disclosed the 911 log because it contained two statements that could have been used to contradict the prosecution's witnesses at trial. First, the log shows that one caller described a perpetrator as wearing a "multi stripe hooded shirt," and another stated that the two perpetrators wore "a multicolor shirt and green pants" and "a colorful shirt and black jeans," respectively. (*See* Foker Aff. Ex. C). This evidence is favorable to Crawford because it is inconsistent with Mitchell's testimony that the second shooter was dressed in a light colored shirt and tan pants. (*See* Trial Tr. at 86).

Second, the 911 log shows that one caller reported that the shooters were "running up the breezeway [sic]." (*See* Foker Aff. Ex. C). Crawford claims that this statement is favorable because it conflicts with Davis's

trial testimony that the perpetrators *walked* back through the breezeway after the shooting. (Trial Tr. at 113-14). Although the statement from the 911 log is consistent with Davis's general account that the shooters left via the breezeway, it does conflict with Davis's testimony insofar as she specifically stated that the shooters walked, and did not run, back up the breezeway after the shooting.

2. *Materiality*

The Court has determined that the supplemental police report, the two witness statements and the 911 log contain information favorable to the defense.

But the Court's finding that these pieces of evidence are favorable to Crawford only begins the inquiry. The prosecution was required to disclose this evidence only if the evidence is material. As discussed above, evidence favorable to the accused is material under *Brady* only if there is a reasonable probability that its disclosure would have resulted in a different outcome, or, in other words, if the prosecution's failure to disclose the evidence undermines confidence in the jury's verdict. *See Kyles*, 514 U.S. at 433-34. The Court must consider the materiality of *Brady* evidence cumulatively, in light of the record as a whole. *Id.* at 436-37.

Crawford argues that the Louisiana Fourth Circuit Court of Appeal did not consider the materiality of the undisclosed evidence collectively, which renders its decision contrary to clearly established federal law.

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As noted, a decision is contrary to clearly established federal law if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or reaches a decision different from Supreme Court precedent on materially indistinguishable facts. *Williams*, 529 U.S. at 406. The Court finds that the state court did neither. The Louisiana state court cited the relevant *Brady* materiality precedent from the United States Supreme Court. It quoted from *Kyles, supra*, at length. *Crawford*, 848 So.2d at 624. It cited *United Stated v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), as well as *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, which is the case the Supreme Court cited as the source of the cumulative review requirement. *Crawford*, 848 So.2d at 624-26; *see also Kyles*, 514 U.S. at 436-37. The state court did not state a rule of law inconsistent with these cases. It is true that the state court did not recite the specific language from *Kyles* that the evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436. The state court did, however, state that the evidence had to "be evaluated in the context of the entire record." 848 So.2d at 625. Furthermore, although the state court did discuss the categories of evidence individually, the *Kyles* Court indicated that it is appropriate to do so to determine the tendency and force of the evidence. 514 U.S. at 436 n. 10. Finally, the state court concluded its inquiry with a discussion of the impact of "withholding the information" on the state's case, apparently referring to the "statements and other documents" together. 848 So.2d at 631. It concluded that these materials would not have damaged the credibility

of the witnesses' identification of Crawford because neither witness was identifying an unknown person, but rather someone they knew previously who had been in the area. *Id.* It also reasoned that the jury was aware that the police had the names of several Georges. *Id.* Based on the foregoing discussion of the state court opinion, this Court concludes that the state court did not apply a rule of law contradicting Supreme Court precedent. Crawford may still be entitled to relief, however, if he shows that the state court's decision was an unreasonable application of clearly established federal law. To do so, he must show that the state court's application of clearly established federal law was objectively unreasonable, not just incorrect or erroneous.

In determining whether the state courts decision was objectively unreasonable, the court considers the withheld evidence cumulatively in light of the record as a whole. The government's case relied for the most part on the testimony of Davis and Mitchell. There was no physical evidence, such as fingerprints or ballistics evidence, to link the defendants to the crime. Crawford argues that the cumulative effect of the withheld evidence would have been to destroy the credibility of the government's witnesses and to permit him to argue that George Jefferson was the second shooter.

Except for the evidence concerning George Jefferson, Crawford contends that the significance of the undisclosed evidence is as impeachment material. Impeachment of eyewitness testimony is an important

factor in *Brady* analysis. In *Kyles*, the Supreme Court stated that "effective impeachment of one eyewitness can call for a new trial." 514 U.S. at 445. The Supreme Court in *Kyles* did not, however, announce a rule that whenever an eyewitness could have been impeached with statements that had not been disclosed, there must be a new trial. This is evident because in *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), decided four years later, the Supreme Court held that even severe impeachment of the only eyewitness to the crime, who "provided the only disinterested, narrative account of what transpired" did not meet Brady materiality standards, in light of other evidence that implicated the defendant in the murder. 527 U.S. at 292-294. Thus the analysis of impeachment evidence involves a determination of both how strong it is and what its impact is in light of all of the other evidence, including other nondisclosed evidence.

*Elijah Mitchell.*

This court finds that the state court's conclusion that the withheld evidence would not have impaired Mitchell's credibility is not objectively unreasonable. Mitchell's trial testimony indicated that he knew the defendants before the shooting and that there was bad blood between the defendants and him. He further testified that he never saw the defendants when they were not together, and that they lived together around the block from him in Gretna. He said that he had earlier confrontations with Crawford and Lindsey, the last of which occurred two days before the shooting. He

testified that the defendants threatened him. There was no evidence that Mitchell had a motive to set up Crawford. He testified that he identified the defendants after he received one shot in his right temple that apparently went through a baseball hat. He said that after he received the first shot he turned around and looked defendants in the face and saw who they were before they continued to shoot him. It was daylight when the shooting occurred. When he got out of the hospital after the shooting, he identified both defendants in a pretrial photographic lineup. There was no evidence that the photographic lineup was suggestive. Crawford relies on the fact that, before trial, Mitchell said that he knew George by only his first name, whereas at trial he testified that he knew Crawford's first and last names. In the context of the entire record, the court does not find that this statement alone or together with other excluded evidence would have impaired Mitchell's credibility in any but an inconsequential way. Mitchell did not try to suggest that he knew the defendants well or that he had a longstanding relationship with them. He said at trial that he had known them only about a month or a month and a half. He did not discuss any dealings with them except to describe tersely the earlier confrontations. Further, that Mitchell said before trial that Crawford had a small caliber gun was not inconsistent with his trial testimony. At trial he said that Crawford, unlike Lindsey, had a small gun, but he did not specify the caliber. The jury already knew that there was an inconsistency between Davis's and Mitchell's description of the guns. (*See* Trial Tr. at 140).

In sum, Mitchell gave eyewitness testimony not just that he saw who shot him, but also that they were not strangers to him and that they had previously threatened him in a verbal altercation two days before. His testimony also placed Crawford in Lindsey's company on more than one occasion before the shooting, and he stated without contradiction that they lived together around the corner from him. Furthermore, there was no evidence that Mitchell's identification of Crawford from the photo lineup was tainted. His testimony would not have been significantly impeached by any of the withheld evidence.

Crawford argues that Mitchell's testimony that he had been shot once before he identified the defendants renders his testimony incredible. The jury was aware of that testimony, and the overall effect of the undisclosed evidence does not make his identification less believable. His statement as to the circumstances of the shooting is fully consistent with his pretrial statement. The undisclosed evidence does not render his testimony suspect.

*Shirley Davis.*

The most serious potential threat to Davis's credibility is the undisclosed evidence that Davis requested that she be relocated before she gave a statement to the police. Crawford argues that he could have used this information to suggest that Davis had a motive to fabricate her identification of the perpetrators in order to get a new apartment. The state court found

that Crawford's use of this evidence at trial would likely have done him more harm than good because it would have enabled the state to elicit testimony from Davis that she had received a threat from the perpetrators of the crime shortly after the shooting. This court does not find the state court's conclusion objectively unreasonable.

The record reflects that Davis talked about being threatened on three occasions before trial. On September 23, 1994, Detective Graffeo made the following entry in his supplemental report:

> Davis stated that she witnessed the murder of Sheri Bailes and was scared for her life because the perpetrators were threatening her. . . . Davis stated to Detective Graffeo that she would come forward and give a statement only if she could be relocated from the Fisher Housing Project. Detective Graffeo informed Davis to come to Police Headquarters and he would put her through the proper channels for relocation. Davis agreed.

(Foker Aff. Ex. B at 13). In her pretrial statement, Davis said that as the defendants were leaving the scene they looked her in the face. She said that she was yelling, "If my momma got [sic] here they ain't got to open my mouth, cause I gonna open my mouth for 'em, I say if my momma got [sic] here I gonna definitely tell the police." (Foker Aff. Ex. H at 5). Later in the interview she said that she was threatened, stating that "he sent a threat." When asked what the threat was, she said,

"He was coming back to kill me." *Id.* at 9. At a pretrial suppression hearing on the morning of trial, Davis repeated that she had been threatened before she went to the police, and indicated that the defendants did not personally deliver the threat to her. (Petr.'s Ex. A, Vol. 4, Ex. D, Mot. Hr'g Tr. at 810-11). After the suppression hearing and before the beginning of trial, the trial judge forbade the state from using evidence of the threat unless Davis's credibility was under attack for not giving the police a statement on the day of the murder.[16] Crawford's use of the relocation request to impeach Davis's credibility would have come within that ruling.

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16. At the suppression hearing, the trial court granted Lindsey's motion *in limine* to exclude any evidence of threats made against any of the prosecution's witnesses. (*See id.* at 820). After opening arguments, however, the court modified its ruling:

> I had previously ruled on the response to the Motions in Limine. I would allow no questions from the State of Louisiana regarding threats made on the life or the safety of the witness, Ms. Davis, in an effort to prohibit the State from bringing out any evidence of the crimes or any threats the defendants had participated in. However, I modified that rule and if there is a cross examination of this witness along the line that she's an incredible witness or her credibility is in question because of the fact she delayed the reporting of this, I will allow redirect from the State of Louisiana as to the reason why she delayed. Now, State, I understand that the reason she delayed was that she was afraid because she's explained that during the Motion hearing.

(Trial Tr. at 25-26).

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Crawford stresses that Davis did not say that he personally threatened her. He further points out that after Davis gave her statement, the police offered her a temporary apartment in the Melpomene housing project in New Orleans, and she turned it down. (*See* Foker Aff. Ex. B at 14). According to Detective Graffeo's report, Davis said she did not want to live in the Melpomene project and would stay in her own residence in the Fischer project. *Id.* Crawford contends that this shows that she was not afraid. On balance, it could only have hurt Crawford's case to have opened the door for Davis to explain to the jury that she asked to be relocated after she received a death threat because she saw the defendants commit the murder. That she decided to stay in the Fischer project, where at least she had family members around her, [17] instead of moving to another New Orleans housing project might or might not have cast some doubt on the extent to which she was afraid. But at the price of injecting a death threat into the case, considering the impact that could have on the jury, the impeachment value of the apartment evidence overall is not substantial. Furthermore, in the context of the entire trial, the utility of this evidence would be further reduced for another reason. After Davis turned down housing in the Melpomene housing project, she nevertheless continued to assist the investigation. First, she showed up to view the photo array in which she identified Crawford two months later. She also appeared at the trial

17. Davis' testimony indicated that her mother, sister, cousins and possibly her aunt lived in the Fischer project. (Trial Tr. *passim*).

to testify against the defendants. There was no evidence that there were any further discussions between Davis and the police concerning housing after her initial encounter with Detective Graffeo. Nor is there any evidence that she ever received anything from the police.

Petitioner also argues that the apartment offer establishes that Davis committed perjury at trial. On direct examination, Davis testified as follows:

> Q: Now, did the detective show these photographs, did they force you to pick anybody out of here?
>
> A: No.
>
> Q: Did they threaten you to pick somebody out?
>
> A: No.
>
> Q: *Did they promise you anything?*
>
> A: *No.*

(Trial Tr. at 123) (emphasis added). Petitioner argues that this testimony was false because the police had, in fact, offered Davis a new apartment. The state court found that this testimony was accurate because Davis turned down the apartment that was offered to her and therefore "received nothing from the police." *Crawford*, 848 So.2d at 629. This Court also finds that Davis' testimony was not false, but for different reasons.

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First of all, Detective Graffeo's Supplemental Report, which is the source of Crawford's argument, does not specifically state that he promised Davis an apartment to come in and give a statement. When Davis said that she wanted to be relocated, Graffeo told her that he would "put her through proper channels for relocation." (Foker Aff. Ex. B at 13). To have to go through the "proper channels" conveys something short of a promise. Further, Graffeo did not offer to relocate Davis to the Melpomene Project until after she gave the statement. *Id.* Ex. B at 13-14.

Even if the Court assumes that Detective Graffeo's legalistic language led Davis to believe she had been assured of relocation, Crawford has not shown that Davis's testimony was perjurious. Read in context, the series of questions the prosecutor asked Davis concerned whether Davis had been threatened, coerced, or promised anything to identify a particular person, *i.e.*, Larry Lindsey, from the photo array. There is nothing in the record to suggest that the police told Davis that they would relocate her only if she identified Lindsey from the photo array. Accordingly, petitioner's argument that the foregoing testimony shows that Davis perjured herself at trial is unfounded.

Petitioner also contends that evidence that Davis had given two other last names for Crawford as of the day after the murder would have undermined the credibility of her photo identification of Crawford two months later. Davis testified at trial that she did not know George's last name at the time of the shooting or when she first

spoke to police, but that she had seen him around the neighborhood. She said that after her initial meeting with police, but before the police presented her with a photo array containing Crawford's picture, she learned Crawford's name by asking people in the project. (Trial Tr. at 121-22). When Davis initially called Detective Graffeo, he noted that she mentioned Ascort as George's last name. (Foker Aff. Ex. B at 13).[18] Two hours later, when she came in to give a statement, she said that she did not know Crawford or where he lived but that she had seen him around the project. *Id*. Ex. H at 7. She said that she did not know his name. *Id.* Later in the interview, she said she got the name George Caldwell from other people in the project. *Id.* at 9. The state court concluded that there was no real conflict on this point between Davis's pretrial statements and her trial testimony because the jury was aware that Davis did not know the second shooter's name at the time of the shooting. Crawford, 848 So.2d at 628.

Davis' pretrial statement makes clear that she did not know George Crawford other than by sight, and, at that time, she had no personal knowledge that his last name was Caldwell or anything else. Her trial testimony is not inconsistent with that. Furthermore, her testimony that she learned Crawford's actual last name after her statement by asking around the project is not inconsistent with her initially having relayed two names

18. Lester Mitchell, Elijah Mitchell's uncle, also mentioned the name George Ascort as the possible name of the second shooter. Detective Graffeo's report indicates that he ran the name through the "NCIC Computer" and it turned up negative. *Id.*

that she had heard and that turned out to be wrong. Although the defense could have attacked Davis's credibility by showing that she passed along two other names in the first day after the shooting to suggest that Crawford's was the third name she came up with, it is doubtful that would have had much effect. The jury knew that she did not know Crawford personally or his last name at the time she originally spoke to the police. The jury was also informed that the basis for her eventual knowledge of Crawford's last name was not firsthand knowledge but information that she obtained from people in the project. Further, the jury was never led to believe that Davis was the original source of Crawford's last name, and the jury knew that other last names for Crawford had surfaced in the investigation. Detective Graffeo testified that he had received other last names for Crawford but no one was sure what it was. (Trial Trans. at 48).[19] Under these circumstances, it is not

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19. Petitioner also argues that Graffeo was impeachable by evidence that Davis gave two other names for Crawford, in that he testified that Davis didn't know the second shooter's last name. Graffeo testified that Davis "knew him from the area but she didn't have a last name on him. I received numerous last names, Jefferson, Ashcott, and different names but no one was positively sure what it was." (Trial Tr. at 48). Graffeo's testimony did not clearly indicate that Davis had provided him with two different last names for the second shooter, so the undisclosed evidence might therefore have had some impeachment value. But Graffeo's testimony clearly conveys that there was uncertainty concerning the second shooter's last name, and the Court finds that the undisclosed evidence would not have undermined Graffeo's credibility, alone or in the context of all of the other undisclosed evidence.

reasonably probable that the jury would have disbelieved Davis's identification of Crawford from the photo lineup. Davis knew Crawford by sight before the shooting, and that she passed on two different last names for him within 24 hours of the shooting does not undermine her identification. She was shown the photo lineup to determine whether she could identify a face, not to give a name, and she admitted that her source of information as to Crawford's last name was other individuals in the project.

Several other of the statements that Crawford asserts could have been used to impeach Davis's testimony reveal relatively minor inconsistencies that likely would not have significantly impaired her credibility. For example, the inconsistency between Davis's pretrial statement and her trial testimony concerning the clothing that the perpetrators wore was that she basically transposed the descriptions: at trial, she testified that Lindsey wore a purple sweatshirt with a hood, and petitioner wore a dark, long-sleeve shirt. But in her pretrial statement, Davis stated that Lindsey wore the dark, long-sleeve shirt, and the second shooter wore a purple and white hooded sweatshirt. Although this inconsistency is not wholly insubstantial, neither is it likely devastating to Davis's credibility, given that the two descriptions were generally similar, though transposed, and that well over two years had elapsed between the shooting and the trial. Nor would Davis' credibility have been significantly affected by the notation in the 911 log stating that an unidentified caller reported that the shooters were "running" up the

breezeway, contrary to Davis's testimony that they walked back through the breezeway. First, although the statement from the 911 log differs from Davis's testimony with respect to the speed at which the shooters departed from the scene, it is supportive of Davis's version of the events generally (*i.e.*, that the shooters came and went via the breezeway). In any event, a jury would not likely consider a minor discrepancy between Davis's testimony and a statement by an unidentified 911 caller to weigh heavily on Davis's credibility.[20] Moreover, Davis's pretrial statements about whether the perpetrators had guns in their hands as they got out of the car and whether she went over to the car at any point after the shooting do not irreconcilably conflict with her trial testimony, and their use at trial would therefore not necessarily have harmed her credibility.

Finally, the state court found that the fact that Davis told the police in her initial statement that "there was just a crowd of people outside" at the scene of the shooting, whereas at trial she revealed that her family members were at the scene would not have jeopardized her credibility. The state court reasoned that it was evident "she was afraid and therefore would have been hesitant at first to identify other witnesses, especially

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20. In addition, the description of the perpetrators' clothing in the 911 log (Foker Aff. Ex. C) is not material because it was cumulative of other evidence before the jury. Davis's testimony concerning the perpetrators clothing at trial was generally consistent with the 911 log, and the jury already knew that Davis's description of the shooters' clothing conflicted with Mitchell's.

her relatives, who were at the scene." *Crawford*, 848 So.2d 615. This Court does not find the state court's conclusion objectively unreasonable.

*George Jefferson.*

The final piece of undisclosed evidence is the anonymous call to police stating that the second shooter's name was possibly George Jefferson. Detective Graffeo's supplemental police report recites that, the morning after the shooting, the police received a call concerning the incident:

> At about 11:15 am., Detective Graffeo was contacted by telephone by a black female who refused to identify herself. This anonymous female informed Detective Graffeo that ... there were two perpetrators who shot the victims. One of the perpetrator's [sic] first name was George. The possible last name was Jefferson, but the female was not sure. The female went on to state that she thought "George" lived [in] or frequented the area of 2000 Lebouef [sic] Ct. The female added that she did not know the second perpetrator. Detective Graffeo ran the name of George Jefferson, and the 2000 block of Lebouff [sic] Ct. through MOTION Computer, but did not find any concrete information.

(Foker Aff. Ex. B, at 12).

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Given the general state of uncertainty about the second shooter's last name immediately after the shooting, this call, without more, would not significantly help Crawford. Indeed, Detective Graffeo testified at trial that he had received the last name "Jefferson" during the course of his investigation. (*See* Trial Tr. at 48). Crawford argues, however, that when he received the supplemental police report after trial, his investigation uncovered additional evidence about George Jefferson that he could have used to show that the police investigation was not thorough, or to point to George Jefferson as one of the shooters.

*Graffeo's Investigation.*

Withheld evidence that would permit a defendant to meaningfully challenge the adequacy of the police investigation can play a significant role in a *Brady* materiality analysis. In *Kyles, supra*, the Supreme Court discussed at length the potentially significant value to the defense of evidence that would highlight the police investigators' apparent lack of skepticism when dealing with a witness who had previously made a number of inculpatory statements. The Court noted that disclosure of the witness's inculpatory statements would have permitted the defense to "examine[ ] the police to good effect on their knowledge of [the] statements and so have attacked the reliability of the investigation in failing even to consider [the witness's] possible guilt. . . ." *Kyles*, 514 U.S. at 446; *see also id.* at 446 n. 15 (noting that "indications of conscientious police work will enhance probative force and slovenly work will diminish it").

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Detective Graffeo's supplemental report stated that his check of the motion computer on September 24, 1994 for the name George Jefferson and 2000 Le Boeuf Court produced no concrete information. The withheld evidence does not the show the results of the September 24 motions computer search. In his post-conviction investigation, Crawford obtained a computerized motion status report on George Jefferson dated October 19, 1995. (Foker Aff. Ex. E). It is possible to reconstruct Jefferson's arrest information as of September 1994, because the motion status report contains a cumulative history of Jefferson's arrests. *Id.* That report showed that as of September 1994, Jefferson had no convictions but that he had been arrested once, and for the first time, the year before on June 22, 1993 for an aggravated assault with a firearm. The report does not show that George Jefferson lived at LeBoeuf Court at that time. The only address shown with the June 1993 arrest is 1335 Wall Court, but it is unclear if that is the address where the arrest was made or where Jefferson lived. Wall Court is in or near the Fischer project. The report indicates that in 1993 and 1995, Jefferson had one gold tooth. Jefferson's date of birth was October 9, 1975, which would have made him almost 19 years old at the time of the Bailes murder. The report indicated that Jefferson was 6'3" tall and weighed 190 pounds, but it is unclear whether that was as of 1993 or 1995. To the extent that Crawford contends that the motion report would have confirmed that Jefferson lived on or frequented LeBoeuf Court as the anonymous caller said might be the case, the report does not bear that out. There is no indication that Detective Graffeo pursued the matter after running

Jefferson's name and the LeBoeuf Court address in the motion computer or that there was other documentation that he knew about or had in the investigative file concerning George Jefferson. In sum, Crawford's evidence suggests that Detective Graffeo found that there was in fact a George Jefferson who was almost 19 years old, that he had no convictions but a first time arrest that was over a year old for aggravated assault with a weapon in the Fischer Project, and that the address listed did not match the information of the anonymous caller.

Crawford contends that Graffeo's investigation was sloppy because his post-conviction investigation discovered other evidence available to the police concerning George Jefferson that indicated that the police should have viewed him as the prime suspect. Specifically, Crawford obtained the incident report on Jefferson's June 1993 arrest, which showed his address to be 2025 LeBouef Court. (Foker Aff. Ex. D). He also obtained information that, nine months after the Bailes murder, Jefferson was arrested again for beating his girlfriend with a frying pan on July 11, 1995, and his address at that time was 1415 Wall Street. (Petr.'s Ex. A, Vol. 4, Ex. E). Further, Crawford discovered that Jefferson was killed on Thayer street in October 1995 in the area where the Bailes murder occurred a year earlier. (Foker Aff. Ex. G).

The Court does not find it reasonably probable that the other Jefferson information would have undermined the credibility of the police investigation. The name

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George Jefferson was an early tip, and the name never resurfaced in the investigation. Over the next two months, the police obtained two eyewitness statements and two eyewitness photographic identifications of Crawford and Lindsey. Lindsey was under arrest, and there was a warrant out on Crawford. As of that time, the other available information on George Jefferson was that he lived at LeBouef Court in 1993, when he was arrested for the first time for firing an automatic weapon in a fight, and he was the same age and roughly the same physical size as some of the descriptions the police had obtained of the second shooter. *See* discussion, *infra*. It is doubtful that a jury would have believed that the police should have continued to investigate the Jefferson tip in light of the evidence the police had in hand.[21]

*Other Suspect.*

Crawford's most serious argument is that the disclosure of anonymous tip would have allowed him to present an alternative theory of the crime and an alternative suspect. In evaluating this argument, the Court has considered relevant case law on how courts weigh alternative suspect evidence under *Brady*. The Court's review of the case law reveals that there is no per se rule under *Brady* requiring the government to

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21. To the extent that Crawford argues that Jefferson's arrest record pointed to Jefferson as the prime suspect, the Court notes that Crawford's arrest record, which Detective Graffeo checked, was more storied than Jefferson's. *Compare* St. R. Vol. 4, document marked Ex. 3, consisting of 18 pages, with Foker Aff. Ex. E; *see also* Foker Aff. Ex. B at 17.

disclose all evidence concerning alternative suspects. *See Kiley v. United States*, 260 F.Supp.2d 248, 273 (D.Mass.2003). When there is no plausible nexus between the alternative suspect and the crime, courts have not found the evidence material. *Id.* In *Kiley*, the court rejected a defendant's *Brady* claim that the prosecution failed to disclose a number of reports implicating other individuals besides the defendant as involved in the bank robbery at issue, including an informant who told police that two years before the robbery he worked with another person who expressed an interest in robbing the same bank vault. In addition, citizens reported hearing from people claiming to be involved in the robbery or taking responsibility for the robbery. *Id.* at 268-74. After noting the strong evidence against the defendant, the court held that the undisclosed reports identifying alternative suspects did not establish a *Brady* violation because the reports did not provide a "plausible nexus" linking the other suspect to the crime. *Id.* at 270, 273. Similarly, in *Spence v. Johnson*, 80 F.3d 989 (5th Cir.1996), the Fifth Circuit rejected a *Brady* claim grounded on undisclosed evidence of an alternative suspect when the prosecution could have offered evidence to exculpate the alternative suspect. 80 F.3d at 998-99 ("In short, had Spence been given these police records and presented his theory regarding Harper at his trial, the State could have countered with other facts exonerating Harper."); see also *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972) (no *Brady* violation when undisclosed evidence concerned another suspect, an early lead that police abandoned when eyewitnesses to the crime were found and it was

determined suspect was mistakenly identified); *Huber v. Schriver*, 140 F.Supp.2d 265 (E.D.N.Y.2001) (no *Brady* violation when undisclosed evidence of other suspect included report classifying him as armed robbery suspect.)

When there is evidence available to link the alternative suspect to the crime, however, courts have found the prosecution's failure to inform the defense about the alternative suspect material. In *Mendez v. Artuz*, 303 F.3d 411 (2d Cir.2002), for example, the prosecution had evidence indicating that another individual had put a contract out on the victim's life. 303 F.3d at 412-13. In holding that the prosecution violated *Brady* by withholding this evidence from the defense, the Second Circuit emphasized that the evidence provided "a possible alternative perpetrator *and* motive" to kill the victim. *Id.* at 413 (emphasis in original). In *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir.1981), the Fifth Circuit found that undisclosed evidence was material when it provided an alternative suspect who could be placed at the scene of the crime and who allegedly admitted to others that he had committed the crime. 651 F.2d at 1075-77; *see also, e.g., Graves v. Dretke*, 442 F.3d 334, 343-44 (5th Cir.2006) (state's failure to disclose co-defendant's statement implicating his wife in the crime violated *Brady* because it would have permitted defendant to argue that wife was the second participant in the crime); *Jamison v. Collins*, 291 F.3d 380, 390-91 (6th Cir.2002) (evidence of alternative suspect material when undisclosed evidence showed that alternative suspect was found in possession of a wallet from a similar

robbery and was known to wear a straw hat, which was consistent with description given by several witnesses); *Smith v. Sec. of NM Dept. of Corr.*, 50 F.3d 801, 810-12, 829-32 (10th Cir.1995) (undisclosed evidence material when alternative suspect was seen in the area of the killings, found in possession of clothing that appeared to have blood on it, had potential motive to kill one of the victims and had a prior conviction record); *Miller v. Angliker*, 848 F.2d 1312, 1322-23 (2d Cir.1988) (undislosed evidence identifying alternative suspect, placing him in the area of the crimes on multiple occasions and noting physical evidence potentially linking him to murders, combined with fact that he was later arrested at location where murder victims were found, material under *Brady*); *Lopez v. Massachusetts*, 349 F.Supp.2d 109, 116, 120-21 (D.Mass.2004) (withheld evidence material when it identified alternative suspect with "method, opportunity and motive" to commit crime).

The anonymous call identifying George Jefferson as a potential suspect does not rise to the level of the type of alternative suspect evidence that courts have found material. Crawford has not established the kind of specific links between George Jefferson and the shooting that were present in the cases cited above. The anonymous caller did not claim to have witnessed George Jefferson commit the murder; nor did she give any basis for the tip. (Foker Aff. Ex. B at 12). Further, there is no evidence in the record that Jefferson knew Sherri Bailes or Elijah Mitchell, the two victims, or Shirley Davis, the prosecution's other eyewitness. Nor is there any evidence that Jefferson knew the defendants. No

evidence linked Jefferson to the area on day of the shooting. No physical evidence linked Jefferson to this crime. There is no evidence that Jefferson had a motive to shoot these victims. The police report on Jefferson's murder, which identifies his killer, suggests nothing that links either Jefferson or his killer to this case. (Foker Aff. Ex. G). Jefferson's aggravated assault arrest a year before this murder does not link him to this case, nor does the fact that he was arrested for beating his girlfriend with a frying pan almost a year after the Bailes murder. Jefferson's two arrests were for heat of the moment assaults, not the same modus operandi as premeditated murder.

It is true that records of Jefferson's height are similar to the reports of the height of the second shooter. Most of the records on Jefferson's height indicated that he was 6'3" tall, although his July 1995 incident report lists his height at 6'1". ( *Compare* Foker Aff. Ex. E, G with Petitioner's Ex. A, Vol. 4, Ex. E). The descriptions of the shooters in the record are consistent that one was slightly taller than the other. Elijah Mitchell said in his pretrial statement that one shooter was 6'0" or 6213 tall, and the other was around 6'3". (Foker Aff. Ex. K). Mitchell's uncle, Lester Mitchell, reported that Lindsey was 6'2" tall and the other shooter was 6'4". (Foker Aff. Ex. B). Shirley Davis likewise said in her pretrial statement that the second shooter was a little taller than Lindsey, about 6'4". (Foker Aff. Ex. H). The arrest records of the defendants reflect that Lindsey was 6'0"

(Foker Aff. Ex. G) and Crawford was 6'1",[22] which is consistent with the descriptions that the second shooter was slightly taller than Lindsey. Crawford also stresses that the police reports show Jefferson's weight at 190 pounds and that he had one gold tooth,[23] which, he argues, is close to Lester Mitchell's report that the second shooter had a heavy build and four gold teeth.[24] But Crawford's arrest record reflects that he weighed 195 pounds and had at least three gold teeth,[25] which is significantly closer to Mitchell's description. Overall, the evidence as to Jefferson's physical characteristics would be of more significance if Jefferson matched the description of the second shooter, and Crawford did not. Taken together the evidence about George Jefferson does not provide a non-speculative link between Jefferson and the Bailes murder. This Court does not find that the anonymous tip was material either alone or in combination with the other suppressed evidence.

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22. Crawford's arrest records list him as 6'1" and 195 pounds. He was 19 years old at the time of the shooting. His arrest records show that he had three gold teeth. (*See* State R. Supp. Vol. 4, document marked Ex. 3, consisting of 18 pages).

23. Foker Aff. Ex. E.

24. Foker Aff. Ex. B.

25. *See* Note 22.

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3. *Cumulative Effect of the Undisclosed Evidence*

Analyzed cumulatively, the undisclosed evidence does not raise a reasonable probability that there would have been a different result had the suppressed evidence been disclosed. It is true that the state relied primarily on the testimony of Mitchell and Davis. The undisclosed evidence would not have impeached Mitchell's testimony in any consequential way. His testimony was coherent, established that although he did not know the defendants for a long time, there was bad blood between him and the defendants, that they threatened him two days before the murder, and that he saw them shoot him. He identified both defendants in photo arrays two weeks after the shooting. There is no evidence that the photo array was suggestive. There is no evidence that Mitchell had a motive to frame Crawford. There was no evidence that anyone else had a motive to shoot either Mitchell or Bailes, including George Jefferson. Mitchell put Crawford in Lindsey's company on several occasions. There was no evidence that the two defendants did not in fact know each other. On the other hand, there is no evidence that George Jefferson knew either one of the defendants or was connected to the scene of the crime on the day of the murder. Crawford's suggestion that the undisclosed evidence would have permitted him to argue that Jefferson threatened Mitchell to implicate him simply has no basis in the evidence.[26]

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26. Crawford argues that Jefferson at one time had an address in Gretna, Louisiana, which is where Elijah Mitchell lived. However, the record Crawford relies on shows that (Cont'd)

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There is also not a reasonable probability that the totality of the undisclosed evidence would have changed the jury's evaluation of Davis's testimony. Davis was an unsophisticated, inarticulate witness. It was apparent from her testimony that once she recognized the assailants at the scene, events happened quickly. She was in motion, they were in motion, her mother was screaming, and shots were being fired. Her account of these events at trial was not always easy to follow, and she was not totally consistent as to the precise moment when one event happened in relation to another. Nevertheless, when her testimony is viewed as a whole together with all of the suppressed evidence, Davis does not come across, as Crawford suggests, as someone who fabricated being at the scene of the murder. She identified both defendants as the murderers, both of whom she knew at least by sight before the day of the murder. She had known Lindsey since 1990, and he had a child by her sister. She did not know Crawford before the murder but had seen him around the project. She said that she recognized both defendants when they arrived on the scene, saw them with guns, saw them go through the breezeway, and saw them shooting. She saw where the shots were aimed, which was into the black Corvette. She saw defendants leave the scene.

The most potentially significant piece of suppressed evidence that could have affected Davis's credibility was

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(Cont'd)

Jefferson did not have a Gretna address until sometime after July 11, 1995, ten months after the Bailes murder. (*See* Foker Aff. Ex. E).

her request to be relocated before she talked to police. As the Court discussed earlier, however, had the defense used that evidence it would more than likely have backfired because it would have opened the door to Davis's account of receiving a death threat. That Davis turned down an apartment in the Melpomene Housing project is not a strong basis to suggest that she was fabricating the death threat or her identification of the defendants, one of whom was the father of her sister's child. She continued to insist that she had been threatened as of the time of the trial, when she said so under oath at the suppression hearing. This was well after the apartment issue was off the table. Further, Davis's mother, sister, cousins and possibly her aunt all lived in the Fisher project, and Davis may have perceived staying with her family in the Fisher project as safer than moving temporarily to another New Orleans housing project. Moreover, if Davis's only motivation in identifying defendants was to get another apartment, it is doubtful that she would have continued to assist the investigation after she turned down the offer of housing. There is no evidence she ever received anything from the police. Nevertheless, after Davis turned down the apartment offer, Davis identified Crawford in the photo array and testified at the trial.

That Davis had given Detective Graffeo two other last names before she said she found out what Crawford's last name was from neighbors in the project would not have affected the credibility of her identification for the reasons the Court discussed earlier. It would be different if Davis had said that she saw two other people commit

the murder before she said that she saw Lindsey and Crawford do it. That would have clearly cast doubt on the credibility of her identification. But whether or not Davis knew Crawford's last name does not undermine her ability to identify the face of someone she recognized by sight. She made it clear that her only source of information on Crawford's last name was other individuals in the project. The rest of the inconsistencies Crawford points to between Davis's pretrial statement and her trial testimony singly are not substantial, and taken together are not materially more so. Overall, the undisclosed evidence would not have materially changed her value to the case.

Nor is it reasonably probable that disclosure of the anonymous tip would have altered the outcome of the trial. This is true because there were two eyewitness identifications, evidence of the existence of an animus between defendants and Mitchell, the eyewitnesses were not looking at total strangers when they saw the defendants at the scene, they were both able to identify the defendants before trial, and there is no nonspeculative connection between Jefferson and this murder, as the Court discussed in detail earlier.

Crawford also argues that Detective Graffeo's testimony that he learned the name Crawford in the course of the investigation was "another instance of misleading the jury." (Petr.'s Objections at 36). It was no secret to the defendants that Detective Graffeo obtained Crawford's name from Larry Lindsey, as this information was disclosed well before trial. On January

17, 1996, the state informed the trial court that it did not intend to use Lindsey's statement inculpating Crawford at trial, and it moved to join the defendants for trial. (Tr. Jan. 17, 1996 Mot. Hr'g, State R., Vol. 3 of 5). It was not misleading for Detective Graffeo to tell the jury that he obtained Crawford's last name during the course of the investigation when he learned it from Lindsey. Further, Detective Graffeo could not have revealed to the jury that he obtained Crawford's name from Lindsey, because the state assured the court that it would not use the statement in the trial. Crawford goes on to argue that the undisclosed evidence would have permitted him to show the jury that Lindsey implicated him because he was innocent. On the record as a whole, this Court does not find it reasonably probable that Crawford would have helped himself by informing the jury that his codefendant had implicated him in the murder. This follows because, even with the addition of the undisclosed evidence, the state still had credible evidence identifying Crawford, which Lindsey's inculpatory statement would tend to reinforce. This is especially true since no one contradicted Mitchell's testimony that before he was shot, he never saw Lindsey when Crawford was not with him and that he had confrontations with both of them.

Crawford argues that his case fits the mold of *Kyles v. Whitley, supra.* An examination of *Kyles* reveals that this case is materially distinguishable from *Kyles,* both in the nature of the suppressed evidence and its relative impact on the prosecution and defense cases. Central to the *Kyles* case was that the police relied on an informant

whose statements it suppressed. The informant's statements were replete with significant inconsistencies, and affirmatively self-incriminating assertions, and they indicated that the informant was anxious to see Kyles arrested for murder. In addition to the suppressed evidence of the informant's statements, the government suppressed statements of eye witnesses that it relied on at trial who had changed stories or had given a pretrial description of Kyles that better described the informant. Kyles's theory of the case was that he was framed by the informant who had planted evidence on him to shift the blame to himself. Kyles took the stand, offered an alibi and called supporting witnesses. The Court concluded that the net effect of the suppressed evidence favoring Kyles raised a reasonable probability that disclosure would have produced a different result.

Here, there is no undisclosed evidence from an informant who gave statements that implicated himself, were inconsistent and demonstrated a desire to see Crawford arrested for murder. None of the suppressed evidence here alone or together is of the significance of the informant's suppressed statements in *Kyles*. Further, unlike here, the eyewitnesses in *Kyles* did not identify a person whom they already knew, and one of them was not a victim himself who established that defendants had a motive to shoot him. Moreover, in comparison to this case, the defense case in *Kyles* was stronger before the suppressed evidence was considered and made even stronger thereafter. In this case, the defense called no fact witnesses, neither defendant testified, and there was no alibi evidence. The only testimony the defense offered

was one expert. This case falls short of the facts involved in *Kyles*.

For all of the foregoing reasons, the Court finds that Crawford has not shown that there is a reasonable probability that had the nondisclosed evidence been disclosed, there would have been a different result in his trial. The state court's conclusion that the suppressed evidence was not material was therefore not an objectively unreasonable application of clearly established federal law.

### C. Ineffective Assistance of Counsel

Crawford also argues that he received ineffective assistance from his trial counsel. To demonstrate ineffective assistance of counsel, Crawford must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Crawford must demonstrate that his trial counsel's performance was deficient. *Id.* at 687. To establish deficient performance, Crawford must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To sustain such a claim "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. "Judicial scrutiny of counsel's performance must be highly deferential" and must eliminate "the distorting effect of hindsight." *Id.* at 689. Second, Crawford must also establish that counsel's deficient performance prejudiced the defense. *Id.* at 687.

To establish prejudice, a petitioner must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. If the Court finds that a petitioner has not met the requisite showing as to either prong, the Court may dismiss the claim without addressing the second prong. *Id.* at 697. A claim of ineffective assistance of counsel is a mixed question of law and fact. *Moore v. Cockrell*, 313 F.3d 880, 881 (5th Cir.2002).

Crawford argues that the state court's application of federal law was objectively unreasonable. He objects to the magistrate's report and recommendation on three grounds: (1) counsel failed to obtain a copy of Mitchell's driver's license, which indicates that Mitchell was not allowed to drive without corrective lenses and a special outside mirror;[27] (2) counsel failed to obtain a crime scene expert who would have rebutted Davis's testimony that the shooters began shooting at the end of the breezeway, because no casings were found there, casting additional doubt on her credibility; (3) counsel failed adequately to cross-examine Davis about how close the shooters got to the car, which would have revealed inconsistencies between her testimony and both Mitchell's testimony and the physical evidence.

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27. Crawford submits a copy of Mitchell's driver's license that indicates that Mitchell is under restrictions "3, 4, 00," but Crawford submits no evidence as to what those restrictions are. (Vol. 9, Aff. of Eric Foker, Ex. J).

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The Court cannot conclude that the state court unreasonably applied federal law. The state court rejected Crawford's first argument, concluding that "[t]here is no indication . . . that there was any evidence to make counsel believe that Mr. Mitchell had any visual disability. . . . Nor is there any indication of whether or not Mr. Mitchell was wearing corrective lenses at the time of the shooting." *Crawford*, 848 So.2d at 632. Crawford argues that counsel should have been alerted that Mitchell's eyesight was deficient by the presence of a pair of eyeglasses folded on the floor of the Corvette in front of the passenger seat in which Mitchell was sitting. To support this assertion, Crawford relies on a crime scene photograph that does not show the floor of the Corvette in front of the passenger seat. (*See* Petr's. Ex. A, Foker Aff., Ex. M). Even accepting that counsel should have been alerted to Mitchell's deficient eyesight, however, the failure to obtain Mitchell's driver's license and question him about his eyesight at trial is not so serious an error as to fall outside the wide range of reasonable assistance. Counsel is not obligated to investigate every conceivable nonfrivolous matter. *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir.1992). Further, Crawford has not addressed the state court's second point that there is no evidence that Mitchell was not wearing corrective lenses at the time of the shooting. Without such evidence, Crawford cannot show that he was prejudiced by counsel's failure to question Mitchell about his eyesight.

The state court also rejected Crawford's second argument that his counsel was ineffective because he

failed to hire a crime scene expert who, Crawford asserts, could have testified that the placement of the shell casings indicates that the shooters must have been near the Corvette and not, as Davis testified, just off the breezeway more than 50 feet away from the Corvette. The state court concluded that counsel's performance was not deficient for this reason because there is no indication that counsel knew before trial how Davis would describe the shooting, so there was no reason for him to anticipate that a crime scene expert would be valuable. Crawford does not address the state court's analysis. Although Davis did testify at a pretrial motions hearing and gave her account of the shooting, that hearing took place the same day as the one-day trial, which did not leave counsel time to obtain a crime scene expert once he knew how Davis would testify. The Court finds that the state court's decision was not an objectively unreasonable application of federal law.

The state court also rejected Crawford's third argument, that counsel was ineffective because he failed to cross-examine Davis on the basis of her pretrial testimony at the motions hearing. At the hearing, Davis testified that the shooters "didn't get close to the car" (Mot. Hr'g Tr. at 31), while Mitchell testified at trial that the shooters were firing at him at relatively closer range. (Trial Tr. at 78). Crawford argues that cross-examination would have revealed the contradiction between Davis's testimony and both Mitchell's testimony and the physical evidence that casings were found only on the street near the car. The Court finds that counsel's performance was not deficient. Crawford is relying on the thorough review

permitted by a written record of the proceedings to point out intricate details revealed by a close examination of that record. Such an examination is not consistent with the judicial deference to counsel's performance that *Strickland* requires, much less with *Strickland*'s requirement that "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Accordingly, the Court finds that Crawford has failed to establish that he received constitutionally inadequate assistance of counsel.

## IV. CONCLUSION

For the foregoing reasons, the Court DENIES Crawford's petition for a writ of habeas corpus.

New Orleans, Louisiana, this 11th day of July, 2006.

s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

## APPENDIX C — ORDER OF THE COURT OF APPEAL OF THE STATE OF LOUISIANA, FOURTH CIRCUIT DATED FEBRUARY 12, 2003

**COURT OF APPEAL**
**FOURTH CIRCUIT**
**STATE OF LOUISIANA**

No. 2002-K-2048

STATE OF LOUISIANA

VERSUS

GEORGE CRAWFORD

ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS
PARISH NO. 376-596, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE

(Court composed of Chief Judge William H. Byrnes, III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

**WRIT GRANTED; RELIEF DENIED; CONVICTION & SENTENCE AFFIRMED**

The defendant George Crawford's writ application is granted to review his claims for post-conviction relief. However, upon review, relief is denied, and his conviction and sentence are affirmed.

*Appendix C*

*Procedural History*

In June 1995, Larry Lindsey and George Crawford were indicted for the first-degree murder of Sherri Bailes. On January 7, 1997, a twelve-member jury found them guilty as charged, and the next day the jury deadlocked as to the penalty. The trial court sentenced both men to life imprisonment without benefit of parole, probation or suspension of sentence. On appeal, both men requested only a review of the record for errors patent, and this court affirmed both convictions and sentences in an unpublished opinion. *State v. Lindsey,* unpub. 97-1098 (La.App. 4 Cir. 3/10/99), 737 So.2d 978 (TABLE). The Louisiana Supreme Court denied writs. *State v. Lindsey,* 99-1122 (La.10/15/99), 748 So.2d 463.

On October 12, 2000, Crawford filed in the trial court an application for post-conviction relief, and the State subsequently filed procedural objections to the writ. The court denied these objections on December 4, 2001. After a hearing on the merits on June 20, 2002, and on July 11, 2002, the trial court denied the application. Crawford noted his objection, timely filed his notice of intent to seek writs, and timely obtained extensions of the return date. He now comes before this court seeking relief from the trial court's ruling.

*Facts*

The following fact summary was taken from this court's unpublished opinion in Crawford's appeal, *State v. Lindsey, id.*, 97-1098 pp. 2-6, 737 So.2d 978:

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At trial the victim's mother, Linda McDonald, testified that her daughter, Sherri Bailes, was twenty-eight years old on September 22, 1994, when she was killed. She lived with her mother and left two children who are being raised by Ms. McDonald. Sherri worked as an outside sales agent for Minute Man Press, and she had a cocaine problem.

Dr. Alvaro Hunt, an expert in forensic pathology, testified that he performed the autopsy on Sherri Bailes in September of 1994. He found that she suffered severe gunshot wounds from a bullet that passed through her right arm and into her right chest cavity. It then struck her right lung and her aorta. The bullet next went into her abdominal cavity where it struck her spleen and then came to rest against the twelfth rib. A second bullet entered the right side of her abdomen approximately five inches to the right of her navel. The bullet went through the abdomen as well as the membrane which supports the uterus. It lodged in the left side of her buttocks. Both bullets were recovered. The bullet wound to the right side of her chest caused her death. The doctor stated that Ms. Bailes might have been conscious five minutes after being shot, and she could have driven a car a short distance. Chemical analysis of body fluids from the victim's bile and vitreous fluid from the inside of the eye globe indicated that the victim recently had ingested cocaine.

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State Trooper Anthony Graffeo, who was formerly an officer with the New Orleans Police Department assigned to the Homicide Division, testified that he investigated the death of Sherri Bailes and the shooting of Elijah Mitchell. On September 22, 1994, the officer went to the 2000 block of Thayer Street, which is located in the Fischer project. By the time the officer arrived, the two victims had been taken to the hospital. At the scene, the officer found a white Oldsmobile parked on the right-hand side. There was broken glass in the back of it and eight spent nine-millimeter casings and a live nine-millimeter round. A black and white Atlanta Falcon's hat found on the ground had a bullet hole through the top right peak. A black Corvette was parked approximately 270 feet beyond the Oldsmobile. The Corvette was off the street and in the bushes. The back window was completely blown out, and the evidence showed it had recently been shattered because little particles of glass still clung to the rim of the windshield. A nine-millimeter spent casing was found in the passenger seat. A pool of blood was still standing in the passenger seat and in the driver's seat. A wrapped white rock of cocaine was also found on the front seat.[1]

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1. The parties stipulated that the rock was tested and proved to be cocaine.

The next day the officer met with Shirley Davis, a witness, who gave him the names of the defendants. She said Larry Lindsey was the perpetrator and a man named "George" was with him. Ms. Davis was shown a photographic line-up and selected the picture of Larry Lindsey. Sherri Bailes died on the way to the hospital and although he was in critical condition, Elijah Mitchell recovered. After an arrest warrant for Larry Lindsey was issued, he was arrested on October 6, 1994. Meanwhile the officer discovered the full name of George Crawford, and Elijah Mitchell also named him as a perpetrator. A photographic line-up was prepared, and Mitchell selected George Crawford's photo.

Officer Byron Winbush, an expert in firearms examination and analysis, testified that a firing pin makes an impression on the bullets fired, and all bullets fired from the same gun contain similar impressions and are different from bullets fired from another gun. Officer Winbush tested the bullet casings and the two bullets that were recovered in this case. The two bullets taken from the victim's body matched each other, indicating both were fired from the same gun. Seven of the nine casings matched each other, indicating they were fired from the same gun, and the other two casings matched each other. Officer Winbush could not say that the two recovered

bullets belonged to either set of casing. He noted that the bullets could belong to either group of casings. The officer testified that all the casings could not have come from the same gun. Two guns were involved in the shooting.

Elijah Mitchell, the twenty-eight year old survivor of the shooting, testified that he was with Sherri Bailes, his girlfriend, when she was killed. Mitchell said that Ms. Bailes had come to Thayer Street to pick him up. She was alone in her Corvette when he got into the front passenger seat. The two began arguing. Suddenly, Mitchell was aware that someone was approaching from the right. As he turned, he was shot in the head. He turned more to the right, and he was shot twice in the face and again in his shoulder. He fell back against the seat and was shot "a couple more times." Mitchell said the two men who shot him were "Larry and George." Larry Lindsey was carrying a "Tech 9" weapon, and George Crawford had a pistol. Lindsey had a black bandana over his nose and mouth. Mitchell said he was shot ten times, and he raised his shirt to show the jury the scars on his stomach. After the shooting started, Ms. Bailes' car began moving and moved thirty or forty yards before stopping. Mitchell identified the black hat with the bullet hole in the top as the one he was wearing when the shooting occurred.

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Mitchell was shown two photographic line-ups from which he selected the photos of the defendants. Mitchell said he was involved in three arguments with the defendants: the first was really Sherri Bailes' argument, the second concerned Mitchell's cousin, and the third was about Mitchell's property. After the third argument and only two days prior to the shooting, the men threatened him. Mitchell admitted he has two prior convictions from New Orleans: one from 1990 for receiving stolen goods, and the other from 1989 for simple burglary. Mitchell has two other convictions from Dallas: one for burglary of a building, and the other for possession of cocaine. Both are from 1996. He received five years and two years probation respectively for the convictions in Dallas. At the time of trial Mitchell was incarcerated in Texas for violating his probation.

Detective Gary Marchese, of the Homicide Division, testified that he showed a photographic line-up to another witness. He said Shirley Davis came to police headquarters to look at the photographs. She identified the photo of George Crawford.

Ms. Shirley Davis testified that she was living at 1020 LeBoeuf Street, Apartment 1C, in the Fischer Project in September of 1994 when she witnessed a shooting. Ms. Davis said

> must be adopted. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *State v. Smith*, 600 So.2d 1319, 1324 (La.1992).

Crawford was convicted of first-degree murder, which is defined in pertinent part by La. R.S. 14:30 as the killing of a human being "[w]hen the offender has the specific intent to kill or to inflict great bodily harm upon more than one person." La. R.S. 14:30A(3). In the present case, the physical evidence proved that the perpetrators killed Ms. Bailes while trying to kill or inflict great bodily harm on Mr. Mitchell. Crawford does not argue that the State failed to prove that a first-degree murder occurred. Instead, Crawford argues the State failed to prove he was one of the men who committed the first-degree murder.

Crawford complains that the evidence was insufficient because the testimony of the two witnesses, Ms. Davis and Mr. Mitchell, is mutually exclusive, and the testimony of Ms. Davis contains so many internal contradictions that it is unbelievable.

*Testimony of Ms. Davis*

Crawford initially points to the testimony of Ms. Davis that the perpetrators only shot from the porch area of the courtyard, in contrast to Mr. Mitchell's testimony that the men were walking up to him when they began shooting at the car. However, Ms. Davis testified that

she saw the perpetrators begin shooting when they were walking through the breezeway. In addition, when later asked if all shots were fired from the porch, she replied that the perpetrators "came up off the porch" when they were shooting.

Crawford next points to Ms. Davis' contradictory testimony as to whether she saw the shooting. Ms. Davis first testified that she saw the perpetrators shooting when they got to the front of the breezeway and that the perpetrators were still walking through the breezeway when they began shooting. She also testified that she saw both perpetrators firing. Crawford claims that Ms. Davis' testimony is inconsistent as to whether she saw the shooting at the front of the building. The prosecutor asked Ms. Davis: "[Y]ou didn't see who did the shooting outside in front of the building on Thayer? Is that correct?" Ms. Davis replied, "Yes." Although Crawford describes this testimony as Ms. Davis admitting she did not see any of the shooting, the question presented her to was whether she saw the shooting after the perpetrators exited the breezeway and walked to the front of the building, where Ms. Davis insisted at trial she did not go. Her answer that she did not see the shooting after the perpetrators got to the front of the building does not contradict her testimony that she saw the perpetrators shooting in the breezeway.

Crawford next points to Ms. Davis' testimony as to whether the perpetrators had their faces covered when they got out of their car. When asked, "... when they first got out of the car, did they already have the bandannas

on?" Ms. Davis replied, "Yes." Later, she testified that the men put the bandannas on "as soon as they got out of the car." Ms. Davis testified that the bandannas were only over the men's mouths, and she was acquainted with at least Lindsey at the time of the shooting. This "inconsistency" did not render her testimony unbelievable.

Crawford asserts that casings were found in the street and in the path of the shots, despite Ms. Davis' testimony that the shootings occurred fifty feet from where the car was parked. As noted above, however, Ms. Davis testified that she did not go to the front of the building while the shooting occurred, and her only viewpoint during the shooting was in the breezeway, where she testified that the shooting began.

Finally, Crawford refers to Ms. Davis' testimony that she did not discuss the shooting with anyone until she contacted the police the day after the shooting. Although Crawford finds this testimony suspect, there was no evidence presented at trial to show that Ms. Davis discussed the shooting prior to that time.

*Testimony of Mr. Mitchell*

Crawford also attacks Mr. Mitchell's credibility. Initially, Crawford avers that Mr. Mitchell's testimony, that he could be shot in the head and still be able to see who shot him, was "patently unbelievable". However, the jury was aware of the fact that Mr. Mitchell was shot in the head, and it apparently chose to believe his testimony.

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A fact finder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. *State v. Huckabay,* 2000-1082 (La.App. 4 Cir 2/6/02), 809 So.2d 1093, *writ denied* 2002-0703 (La.11/1/02), 828 So.2d 564; *State v. Harris,* 99-3147 (La.App. 4 Cir. 5/31/00), 765 So.2d 432, *writ denied,* 2000-1946 (La.9/21/01), 797 So.2d 60. In the present case, the jury was able to observe Mr. Mitchell's demeanor while testifying. In addition, Mr. Mitchell knew both defendants, and he testified that he was shot as he turned his head toward the men.

Crawford notes that Mr. Mitchell testified that he was conscious enough to identify the perpetrators at the scene, but no one asked him to do so. The parties entered a stipulation that the responding officers would testify that neither victim was able to give a statement at the scene. Considering that Mr. Mitchell had just been shot several times, it is not unreasonable that he did not give a statement at the scene. Crawford also asserts that Mr. Mitchell admitted he had prior convictions. However, the jury was aware of this but chose to believe Mr. Mitchell's testimony. The jury as fact finder makes credibility calls, and the jury must have concluded that Mr. Mitchell's prior convictions did not render his testimony unbelievable.

Crawford also argues that because the testimony of Mr. Mitchell and Ms. Davis is mutually exclusive, there was no evidence to support his conviction. As reviewed above, their testimonies are not entirely mutually exclusive, because Ms. Davis' testimony concerned her

observations of the shooters as they were walking through the breezeway, while Mr. Mitchell's testimony concerned his observations from within the car. The jury heard both witnesses, and it was free to believe either witness' testimony concerning the shooting and the witnesses' ability to see the shooters.

Given the fact that Mr. Mitchell testified that he knew both defendants, and Ms. Davis testified that she knew one well and recognized the other from the area, the jury acted well within its discretion in believing both witnesses when they identified Crawford as one of the perpetrators. The evidence was sufficient to support the jury's finding that Crawford was one of the perpetrators of the shooting.

*Brady Material*

Crawford contends that the State withheld exculpatory material that, if known by counsel, could have been used to impeach the credibility of both Ms. Davis and Mr. Mitchell. He asserts that the suppression of this impeachment evidence undermined confidence in the jury's verdict against him.

The withheld material to which Crawford refers are the statements of Ms. Davis and Mr. Mitchell, as well as the 911 tapes, Mitchell's medical records, and various police reports.

To comport with the dictates of the due process clause of the Fourteenth Amendment, the State must

disclose to the defense evidence that is favorable to the defense and is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Porter*, 98-0279 (La.App. 4 Cir. 3/15/00), 756 So.2d 1156, *writ denied*, 2000-1135 (La.1/10/02), 790 So.2d 3. Included in this rule is evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial, that is, evidence favorable to the defendant which is material to guilt or punishment." *State v. Rosiere*, 488 So.2d 965, 970 (La.1986). See also *Porter, supra.*

Materiality was defined in *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985): "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." The same test is to be employed whether or not the defense makes a pretrial request for exculpatory evidence. *Bagley; State v. Phillips*, 92-1063 (La.App. 4 Cir. 2/29/96), 670 So.2d 588, *writ denied*, 96-2131 (La. 9/5/97), 699 So.2d 85.

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In *Kyles v. Whitley*, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 1565-1566, 131 L.Ed.2d 490 (1995), the Court discussed "materiality":

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.
>
> The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need

> not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

In *State v. Baker,* 2000-2520 (La.App. 4 Cir. 11/21/01), 801 So.2d 1196, the State withheld a pretrial statement of a witness to a shooting that left two men dead. During trial, the defense obtained a copy of the statement, which differed to some extent from the witness' pretrial hearing testimony and his trial testimony. The trial court, however, declared a recess for the evening, and defense counsel used the statement the next day during cross-examination to impeach the witness' credibility. On appeal, this court rejected the defendant's claim that he was deprived of his right to a fair trial due to the State's late disclosure of the statement. This court noted that defense counsel was allotted time to prepare a cross-examination based on the statement, and indeed counsel used the statement to impeach the witness. This court also noted that in addition, the trial court withheld the introduction of some photographs based upon this late disclosure. This court

pointed to the fact that the jury returned a lesser verdict (second instead of first-degree murder) and found that the late disclosure did not result in a reasonable probability sufficient to undermine confidence in the verdict.

In *State v. Kemp*, 2000-2228 (La.10/15/02), 828 So.2d 540, the Louisiana Supreme Court held that the late disclosure at trial of a pretrial statement by a witness to a murder undermined confidence in the verdict, and it reversed the defendant's conviction. The defendant was convicted of shooting the brother of a man with whom he was going to have a fight, and the witnesses all testified that the victim was unarmed and trying to stop the shooting when it occurred. There were various witnesses to the shooting, and the defense called the lead investigator in the case, using his police report to impeach the testimony of various witnesses. On cross-examination of the officer, the State played tapes of the witnesses' statements, and in one of the statements, one witness told the police that she heard the victim speaking with the defendant and his companion just prior to the shooting, asking them: "Do you want to fight it out or do you want to shoot it out?" *Id.*, at p. 6, 828 So.2d at 545. Defense counsel objected, contending that the State withheld exculpatory evidence showing a basis for the defendant to believe his opponent would be armed.

The trial court refused to grant a mistrial, finding that this statement was not exculpatory. The Supreme Court reversed the conviction, stating:

While witness statements are normally not discoverable, La.C.Cr.P. art. 723, this discovery rule must give way when a statement contains favorable information for *Brady* purposes. *Kyles*, 514 U.S. at 441-45, 115 S.Ct. at 1569-71; see La.C.Cr.P. art. 718. In addition, the prosecution must make timely disclosure of the favorable evidence to provide the defense with adequate opportunity to present the material effectively in its case. *State v. Prudholm*, 446 So.2d 729, 738 (La.1984). This Court has therefore recognized that late disclosure as well as non-disclosure of exculpatory evidence may deprive the defendant of a fair trial. *State v. Williams*, 448 So.2d 659, 665 (La.1984); *State v. Landry*, 388 So.2d 699, 702 (La.1980); *State v. Roussel*, 381 So.2d 796, 798 (La.1980). As in the case of complete suppression, the state's failure to make timely disclosure of evidence favorable to the defendant must be evaluated in the context of the entire record. *Agurs*, 427 U.S. at 112-13, 96 S.Ct. at 2402 ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."). Given appropriate circumstances, "the effective impeachment of one eyewitness can call for a new trial even

> though the attack does not extend directly to others." *Kyles*, 514 U.S. at 445, 115 S.Ct. at 1571.
>
> *Id.*, 2000-2228 at pp. 7-8, 828 So.2d at 545.

The Supreme Court pointed out that there was evidence from some witnesses that the victim indicated his readiness to fight, and that the forensic evidence did not exclude the possibility that the victim was shot as he reached behind his back for a weapon. The Louisiana Supreme Court found that the withheld witness' statement that the victim offered the option of gunfire to settle the dispute possessed ". . . such potential to give the evidence at trial an entirely different cast that undermines the confidence in *this* jury's rejection of relator's self-defense claim. To this extent, the state's failure to provide timely disclosure impacted the fundamental fairness of the proceedings leading to relator's conviction." *Id.*, at p. 9, 828 So.2d at 546 [emphasis added].

*Impeachment Material as to Mr. Mitchell's Testimony*

The statements of Mr. Mitchell and Ms. Davis were not given to the defense prior to or during trial. Crawford maintains that his counsel received these statements (as well as the 911 log, Mitchell's hospital records, and various police reports) pursuant to a public records request after Crawford's conviction and sentence became final.

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Initially, Crawford contends that the State withheld *Brady* material contained in Mr. Mitchell's statement given to the police. Crawford asserts that he could have used the information in Mr. Mitchell's statement to impeach his credibility as to being able to recognize Crawford as one of the shooters.

Crawford argues that at trial Mr. Mitchell testified that he knew both Crawford's first and last names. In his statement to the police, given shortly after Mr. Mitchell was released from the hospital, he stated that he did not know "George's" last name. However, in both the statement and in his trial testimony Mr. Mitchell stated he knew George because George hung around his neighborhood with Lindsey, whom he identified by both first and last names. In his statement, Mr. Mitchell described Lindsey and the defendant as the neighborhood "bullies" with whom he had argued several times, the last time being two days before the shooting. Whether or not Mr. Mitchell knew Crawford's last name, in both his statement and in his testimony at trial he stated he knew both Lindsey and Crawford from the neighborhood. He positively identified Crawford in the photographic lineup and in trial as one of the perpetrators. Mr. Mitchell's statement as to whether he knew George's last name was inconsequential with respect to Mr. Mitchell's physical identification of Crawford as one of the perpetrators based on Crawford's physical appearance, regardless of his name.

Crawford refers to Mr. Mitchell's testimony that both assailants shot at him from directly outside the window

of the car. He contends that it would have been impossible for Mr. Mitchell to see through the small window of the Corvette. At trial, Mr. Mitchell testified that both shooters were beside the car, not behind it. He also testified that the car door was open at the time of the shooting. He was observing the two men through the open door, not just through the window of the door. In his statement, he placed both men at the side of the car, and he stated that when he first saw them, they were approximately eight yards from the car. He also stated that George was further toward the rear of the car than Lindsey. Mr. Mitchell's statement and his trial testimony were not conflicting.

Crawford also asserts that although Mr. Mitchell told the officers in his statement that George had a smaller gun than Lindsey had, he did not so testify at trial. On the contrary, the trial transcript indicates Mr. Mitchell also testified that George's gun was smaller than Lindsey's gun. The statement did not contain contradictory evidence.

Crawford contends that the State should not have withheld the 911 log because it contained evidence which would have impeached Mr. Mitchell's testimony about the clothes worn by Lindsey's accomplice. Both in his statement and at trial, Mr. Mitchell testified that the accomplice wore a light-colored shirt and tan or khaki pants. Crawford maintains the 911 tape would have shown that this description contradicted a description of the suspects given to the 911 dispatcher by an unknown witness, who indicated that one suspect wore

a multi-striped hooded shirt and the other wore a colorful shirt. Crawford avers that had the jury learned of this different description, it would not have believed that Mr. Mitchell had really seen his assailants and would have attributed his identification to his previous altercations with Crawford and Lindsey. Crawford ignores the fact that Ms. Davis' description of the perpetrators' clothing more closely matched that given in the 911 log, and the jury heard her testimony on this point and was aware that it contradicted that of Mr. Mitchell. The jury was aware of these divergent descriptions, and the introduction of the 911 logs, while perhaps different from Mr. Mitchell's testimony on this point, also would have supported Ms. Davis' credibility.

Crawford further argues that the 911 log would have impeached Mitchell's testimony as to the type of gun Lindsey's accomplice had. Crawford asserts that the 911 log "warned the N.O.P.D. that the shooters used automatic weapons," while Mr. Mitchell testified that George had a smaller gun than Lindsey's Tech 9. However, the entry on the 911 log states: "Tell officer to use caution because the subject has automatic weapons." Because of the lack of subject/direct object agreement, it is unclear if both subjects had automatic weapons, or if only one subject had an automatic weapon. The 911 dispatcher was not at the scene. The 911 entry served to warn the officers going to the scene but was not entered directly by an eyewitness. Given the wording, the entry in the 911 log does not contradict Mr. Mitchell's trial testimony and is not *Brady* material.

Crawford also asserts that Ms. Davis' statement contained impeachment evidence with respect to Mr. Mitchell's testimony. At trial, Mr. Mitchell testified that he was conscious when the officers arrived on the scene, and he indicated he could have identified the perpetrators at the time if anyone had asked him to do so. Crawford argues that Ms. Davis' statement would have impeached this testimony because in her statement she told the police that after the shooting stopped and the assailants fled, she walked over to the car and looked inside, and Mr. Mitchell was gasping and trying to talk. Crawford contends that had he been aware of this statement, he could have impeached Mr. Mitchell's testimony on this point. The jury was aware of Mitchell's true condition, however, through the stipulation given to the jury that if the officers who responded to the scene were to testify, they would state that neither victim was able to give a statement at the scene of the shooting. Ms. Davis' statement was cumulative to what was presented at trial.

Finally, Crawford argues that the State withheld Mr. Mitchell's hospital records, which showed that at the time he was admitted he had both marijuana and cocaine in his system. Crawford asserts that this evidence would have impeached Mr. Mitchell's testimony that he had used no drugs or alcohol on the day of the shooting, but he had done so the day before. He contends that this evidence would have shown Mr. Mitchell was so impaired at the time of the shooting that he could not accurately view his assailants.

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The report indicates that Mr. Mitchell's system had cocaine and marijuana, but it is not clear from the report if the presence could only be attributed to use of these drugs on the day of the shooting, or if the results could also be indicative of use the night before, thus bolstering Mr. Mitchell's testimony. There is no indication that Crawford presented evidence at the post-conviction hearing, nor does he present any in his application, showing that the presence and levels of these drugs in Mr. Mitchell's system could only have occurred with use on the day of the shooting. Crawford did not meet his burden of showing that this evidence proved Mr. Mitchell was so impaired at the time of the shooting that he could not identify his assailants.

*Impeachment Material as to Ms. Davis' Testimony*

Crawford avers that the State's failure to produce Ms. Davis' statement (and apparently the supplemental police report concerning her statement) seriously hampered his ability to impeach her credibility. He argues that because her trial testimony contained various inconsistencies, he would have been able to destroy what credibility she retained, if he had access to her pretrial statement, which contradicted her trial testimony.

Crawford points to her testimony at trial that she was initially unable to give the police a last name for "George", one of the shooters. At trial, Ms. Davis stated she did not know George's last name at the time of the shooting, but she recognized him as someone she had

seen in the Fischer Project. By contrast, in her statement given the day after the shooting she first stated that while she knew Lindsey, she did not know the other perpetrator's name, but she had seen him in the project and that the man had "kin people" in the project "cause they was talking . . . out there last night." Later in the same statement, Ms. Davis told the officers that she got "the whole name, George Caldwell" from "people around there [who] know that's his name."

In addition, a supplemental police report indicated that prior to making this statement, Ms. Davis called Detective Graffeo and told him that the shooters were Larry Lindsey and George Ascort. Crawford asserts that this evidence would have seriously damaged Ms. Davis' identification of him as one of the perpetrators because it showed she had possibly identified two other men as Lindsey's accomplice.

Ms. Davis said she got the name George Caldwell from others in the project. However, her trial testimony shows she got the name from people who did not see the shooting: She stated: "The people who told me his last name wasn't out there." Although the jury was unaware that Ms. Davis gave two other names, the jury was aware that Ms. Davis initially did not know George's last name. Considering this, Ms. Davis' statement, the supplemental police report, and her trial testimony did not really conflict with each other. In a photographic lineup and at trial, Ms. Davis positively identified Crawford as the George who committed the murder with Lindsey.

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Crawford also points to other contradictions between Ms. Davis' statement and her trial testimony. At trial, she testified that Lindsey was wearing a purple sweatshirt and Crawford was wearing a dark shirt, while in her statement she told the police that Lindsey was wearing a dark shirt and the other perpetrator was wearing a purple and white shirt.

Crawford notes that at trial, Ms. Davis testified that both perpetrators had guns when they got out of the car, while in her statement she said she could not see the perpetrator's guns until they had entered the breezeway. In addition, at trial she testified that she never approached the car after the shooting, while in her statement she said that after the assailants fled, she walked over to the car and saw the victims inside. She also testified that her cousins, her mother, and her aunt were on the scene at the time of the shooting, while in her statement she implied she did not know any of the witnesses. Finally, in her statement she said that she saw the perpetrators run through the breezeway, saw them run up to and shoot into the car, and saw the car swerve into the weeds. By contrast, at trial she testified that she saw the perpetrators shooting while in the breezeway, and she denied going to the car after the shooting ended.

The first two discrepancies concerning who wore which shirt and whether the guns were in the perpetrators' hands as they exited their car are distinctions that would not harm her credibility. Both Ms. Davis and Mr. Mitchell testified that both men were

armed and both shot at the car. Ms. Davis' implication that she did not know any of the other witnesses does not unduly impinge upon her credibility where it was evident that she was afraid, and therefore, would have been hesitant at first to identify other witnesses, especially her relatives, who were at the scene. The fact that Ms. Davis was afraid is supported by the supplemental police report that stated that Ms. Davis would not testify unless the police got her another apartment.

Crawford's next contention is that Ms. Davis manufactured her statement to get a new apartment. A supplemental police report indicates that Ms. Davis told Detective Graffeo that she saw the shooting, but she would not give a statement unless a new apartment was found for her **because the perpetrators had threatened her.**

Crawford theorizes that Ms. Davis did not see the shooting but instead manufactured her statement to get a new apartment. Although an apartment was found for her, she declined to take the apartment and still gave the statement. In addition, Crawford mentions that at the time of trial, she was living elsewhere, but he presented no evidence, and there is no indication that her new residence was obtained by the police.

The supplemental report indicates that the reason why Ms. Davis wanted the new apartment was because she had been threatened by the perpetrators, and the court had already ruled that no evidence of any threats

could be presented unless the defense questioned Ms. Davis concerning why she waited until the next day to contact the police. Asking her about this condition of giving the statement would fall within this exception to the prohibition on presenting evidence of the threats. Ms. Davis testified that she received nothing from the police. The fact that Ms. Davis rejected the apartment offered to her, supports the veracity of her statement.

Crawford further argues that the State should have produced the 911 log to show that a witness stated to the 911 operator that the perpetrators *ran* from the scene. He contends this evidence contradicts the testimony of Ms. Davis that the perpetrators *walked* from the scene. Both the 911 log and Ms. Davis' trial testimony indicated that the perpetrators left the scene. It could also be argued that the 911 log would be inculpatory because flight is an indication of guilt.

Lastly, Crawford contends that the State should have produced Ms. Davis' rap sheet for impeachment purposes. He argues that he could have used her arrests and the fact that she had used an alias to impeach her credibility. However, pursuant to La. C.E. art. 609.1, only convictions may be used to attack the credibility of a witness. There is no showing that Ms. Davis had any convictions. If her rap sheet had been produced without any convictions, the defense could not have used it to impeach Ms. Davis' credibility.

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*Alleged False Police Testimony*

Crawford also refers to Detective Graffeo's testimony. Crawford contends that if the State had produced the supplemental reports and the statements of Ms. Davis and Mr. Mitchell, counsel could have impeached the detective's credibility.

Crawford first points to the fact that Detective Graffeo testified that at trial Ms. Davis could not give him a last name for George. However, a supplemental report indicates that she gave him the name George Ascort when she called him to set up the interview. In addition, in Ms. Davis' statement, she first told him she did not know George's last name, and then she stated she learned from others in the project that his name was George Caldwell. Crawford avers that he could have used this evidence to show that Detective Graffeo lied under oath. Detective Graffeo's testimony did not contradict Ms. Davis' testimony that she did not know George's name, and he testified that he received "numerous" last names of George, including Jefferson and Ashcott. The jury was aware that the police had the names of other Georges.

Crawford also contends that Detective Graffeo testified that although no one was really sure what George's last name was, "[t]hey just knew that he hung around the area. That he didn't live there." Ms. Davis' statement supports Detective Graffeo's testimony. Crawford refers to the supplemental police report, which indicates that the police received an anonymous tip from

a woman who indicated George Jefferson could have been one of the perpetrators, and he *lived in or frequented* the 2000 block of LeBoeuf in the same project. The statement continues, however, that Detective Graffeo ran the name and the address and "did not find any concrete information." Nothing indicates that this testimony was false.

*Evidence of Crawford's Innocence*

Crawford also contends that the State withheld evidence that would have proved he was innocent of the murder. Specifically, he alleges that the State received information that George Jefferson might have been one of the shooters, that Jefferson lived in the area, that Jefferson fit the description given by the witnesses, and that Jefferson had a police record, including arrests for firing multiple shots at a man, using an automatic weapon. Crawford attaches to his application various police reports concerning Jefferson which give his address, his vital statistics, and the circumstances of the crimes for which he was arrested.

As noted above, the supplemental police report indicated that Detective Graffeo received an anonymous call from a woman who stated that one of the perpetrators could have been George Jefferson, who lived in or frequented the 2000 block of LeBoeuf Court in the Fischer Project. The report further indicated that a check of that name and address led to no "concrete information."

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Crawford obtained public records which show that George Jefferson, who lived at 2025 LeBouef Ct., Apt. 3C, had been arrested for an aggravated assault occurring a year earlier in the same project, which occurred by shooting a semi-automatic gun at the victim. Crawford also obtained George Jefferson's rap sheet, which indicated Jefferson listed his address on LeBoeuf Court as well as an address in Gretna. In his pretrial statement to the police, Mr. Mitchell stated that both Lindsey and George lived around the block from him, and he lived in Gretna. In addition, Crawford included in his application the affidavit of a private investigator who indicated she obtained a police report concerning Jefferson's aggravated battery of a woman in July, 1995.

In her statement Ms. Davis described George as being a little taller than Lindsey. Crawford has attached a police report from an unrelated crime occurring on the same date as Lindsey's arrest for this case, and that police report indicates Lindsey was 6'0" tall. George Jefferson's rap sheet, the police report of his aggravated assault arrest in June 1993, and the police report of his 1995 murder all indicate he was 6'3" tall.

Crawford argues that had he been given this information prior to trial, he could have used it to prove that Jefferson, who fit the description of the George involved in the shooting, who had lived in both the area of the shooting and near Mitchell, and who had a history of violence, was really Lindsey's accomplice. It is unclear if the State had this evidence in its file.

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In its ruling on the application for post-conviction relief, the trial court noted that even though the pretrial statements of Ms. Davis and Mr. Mitchell were withheld, Crawford "was afforded his due process rights and the outcome of the trial would not have been different," apparently if the statements and other documents had been produced. Crawford has not shown that withholding the information would have impeached the detective's testimony, or that Ms. Davis or Mr. Mitchell's credibility was damaged or rendered their identification of Crawford incredible. Not knowing George's last name had no consequence on whether Ms. Davis and Mr. Mitchell could identify the person as one of the perpetrators upon seeing him in his photo and in person at trial. Both Ms. Davis and Mr. Mitchell did not identify an unknown person but they testified that they knew the defendant (Crawford) previously as someone who had been in the area.

The jury was aware that the police had the names of several Georges. Although they were uncertain of George's last name, both Mr. Mitchell and Ms. Davis positively identified George Crawford as Lindsey's accomplice by his physical presence at separate photographic lineups and at trial. There is no showing that the additional information from the statements, supplemental police report, or 911 log undermined confidence in the jury's verdict and the outcome of the trial.

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*Claim of Ineffective Assistance of Trial Counsel*

Crawford contends that his trial counsel was ineffective. It is unclear whether the trial court expressly ruled on this ground; however, in the interest of judicial economy, the issue is reviewed.

In *State v. Mims*, 97-1500 pp. 44-45 (La.App. 4 Cir. 6/21/00), 769 So.2d 44, 72, *writs denied* 2000-2255 (La.6/22/01), 794 So.2d 781 and 2000-2270 (La.6/22/01), 794 So.2d 782, this court discussed the standard to evaluate an ineffective assistance of counsel claim:

> The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 104 S.Ct. at 2064. That is, counsel's deficient performance will

> only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693, 104 S.Ct. at 2068.

Crawford initially argues that counsel at trial was ineffective because he failed to obtain Mr. Mitchell's driver's license, which would have shown that Mitchell was so nearsighted that he could not drive without wearing corrective lenses and without using a special side mirror. Crawford argues that this document was easily obtainable (his investigator obtained it for his post-conviction relief application), and counsel could have used it to impeach Mr. Mitchell's ability to see his attackers. There is no indication, however, that there was any evidence to make counsel believe that Mr. Mitchell had any visual disability, which would have alerted counsel to the possibility that Mr. Mitchell had vision problems. Nor is there any indication of whether or not Mr. Mitchell was wearing corrective lenses at the time of the shooting, be they glasses or contact lenses. It cannot be said that counsel was ineffective for failing to obtain Mitchell's driver's license prior to trial.

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Crawford also contends that counsel was ineffective because he did not hire expert witnesses who could have shown that the placement of the shells proved the shooting could not have occurred as Ms. Davis testified that it did. There is no indication that counsel was aware prior to trial of how Ms. Davis was going to describe the shooting. Defense counsel did not have a copy of Ms. Davis' statement to the police. There is no indication in the record that Ms. Davis testified at any pretrial hearing. Defense counsel could not have known until trial what her testimony would be, and his "failure" to secure an expert to contradict Ms. Davis' testimony concerning the positions of the shooters did not render him ineffective.

Crawford avers that trial counsel was ineffective for failing to question Ms. Davis about her two-month delay in identifying Crawford as one of the perpetrators. He admits that counsel did not pursue this line of questioning because of a ruling on a motion *in limine,* allegedly filed by his codefendant, which prohibited the State from mentioning threats made to Ms. Davis, unless either codefendant questioned her about this delay in contacting the police. In that case, the State could question her about threats she received. Crawford maintains that his counsel was ineffective for "agreeing" to this ruling. He theorizes that because his codefendant filed the motion *in limine,* any threats to Ms. Davis must have come only from his codefendant, not from him, and thus counsel should not have "agreed" to this ruling. In a footnote, he points out that the transcript of the hearing on the motion *in limine* was not in the record, and he

later argues that appellate counsel was ineffective for failing to request this transcript for appeal (as discussed below). However, Crawford did not provide the transcript in preparation for his post-conviction relief application. That transcript is not before this court, and it would be speculative to conclude that Crawford's conduct was not involved in the motion *in limine*. The fact remains that the trial court ruled that defense counsel could question Ms. Davis about her delay in contacting the police only upon pain of the evidence of threats being placed before the jury. Counsel's compliance with this ruling, a violation of which would have informed the jury of the threats, did not constitute ineffective assistance of counsel.

Crawford also asserts that his defense counsel was ineffective in his cross-examination of Detective Graffeo, the lead investigator in the murder. He first argues that if the defense counsel had compared Detective Graffeo's testimony at a pretrial hearing with the State's answer to his bill of particulars, the defense counsel could have discovered that Detective Graffeo testified falsely at the pretrial hearing when he stated that the codefendant did not give a statement to the police. Crawford contends that defense counsel could have used this information to impeach Detective Graffeo's credibility. He further avers that his defense counsel could have presented evidence that Detective Graffeo first obtained Crawford's name from his codefendant, rather than from a witness, and he theorizes that his codefendant would have been much more likely to name an innocent person (Crawford) as his accomplice rather than his real accomplice, who could

have given the police information damaging to him. Crawford asserts that cross-examination of Detective Graffeo on this point "would have cast great doubt on the thoroughness of his investigation."

It is true that Detective Graffeo did not mention that he had received Crawford's name from Lindsey; Detective Graffeo only testified that "[d]uring my investigation I found that the last name of the subject was George Crawford." It is not clear how the jury's learning that Detective Graffeo got Crawford's name from Lindsey would somehow make it appear that Detective Graffeo's investigation was incomplete. Detective Graffeo may have initially obtained Crawford's name from Lindsey, but the fact remains that both Mr. Mitchell and Ms. Davis identified Crawford in photographic lineups and at trial. In addition, the fact that Detective Graffeo testified at a pretrial hearing that Lindsey did not make a statement would not, as theorized by Crawford, have so damaged the detective's credibility as to make his testimony unbelievable or to have made the jury find that his investigation of the case was incomplete.

Crawford also contends that counsel was ineffective because counsel fell asleep during the State's direct examination of both Ms. Davis and Mr. Mitchell. In support of this claim, he presents an affidavit from a spectator in the court. The "spectator" is his mother. Given this relationship, the trial court did not err in failing to give credit to this claim, which is supported only by the affidavit of Crawford's mother.

Finally, Crawford argues that trial counsel was ineffective because he failed to file a motion for directed verdict at trial due to the insufficiency of evidence presented. This claim fails on two grounds. Initially, Louisiana does not have a motion for directed verdict in criminal cases. The vehicle for seeking an acquittal at the end of the State's case is a motion for acquittal, but pursuant to La.C.Cr.P. art. 778, it may be filed only in a bench trial. Secondly, as noted in the discussion of Crawford's first claim, the State presented sufficient evidence to support his conviction.

We find no merit to Crawford's claims of ineffective assistance of his defense counsel at trial.

*Ineffective Assistance of Counsel on Appeal*

By his final claim, Crawford contends appellate counsel was ineffective. Again, the trial court's judgment did not expressly address this issue; however, in the interest of judicial economy, this Court will address the issue. Crawford asserts that counsel's brief was insufficient pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Jyles*, 96-2669 (La.12/12/97), 704 So.2d 241. Crawford argues that the brief was deficient because appellate counsel did not point out the contradictory testimony of Ms. Davis and Mr. Mitchell. He notes that the brief contained a list of defense objections and the court's rulings, without a full explanation of why counsel was not raising error as to these objections. Crawford also theorizes that appellate counsel reviewed only the trial

transcript in connection with this appeal. He finally argues that appellate counsel was ineffective because he did not seek to supplement the appeal record with the transcript of the motion *in limine.*

With respect to the testimony of Ms. Davis and Mr. Mitchell, the jury heard the testimony of both witnesses, and as noted above, the evidence presented at trial was not so confusing or contradictory as to render it unbelievable. There was sufficient evidence to support the verdict if the jury believed the witnesses. It cannot be said that counsel was ineffective for failing to point out the inconsistencies in his brief. Likewise, nothing indicates that appellate counsel only reviewed the trial transcript prior to filing his brief. This court had a full record on appeal, and counsel's brief includes a procedural history that could not have been gleaned from a review restricted to a reading of the trial transcript.

Crawford's claim as to appellate counsel's failure to supplement the record with the transcript of the motion *in limine* has no merit. Crawford argues that because the motion was filed only by the codefendant, it must not have pertained to him in any way. Crawford does not include in his application a copy of the transcript of the motion *in limine.* It is unclear from the docket master and minute entries when this motion was filed, who filed it, or when it was actually heard. The only reference to it in the application before this Court, occurred just prior to the beginning of testimony, when the trial court noted that the motion was granted. The trial court did not indicate who filed the motion, and it

merely stated that it had "previously" ruled on the motion. Crawford contends that: "[a]bsent further information about the circumstances surrounding this hearing, there is no way to argue intelligently that the ruling either unfairly prevented Mr. Crawford from cross-examining Davis, or that the trial should have been severed at that point." Crawford further argues that because Lindsey filed the motion, "it was quite possible, even probable, that only Lindsey was implicated in any threats."

The above-quoted passage demonstrates that Crawford does not know what was contained in the transcript; however, he did not obtain a copy of the transcript in preparation of his application for post conviction relief. His "assertions" are, in essence, guesswork on his part as to whether there was any information elicited at the hearing that would have shown that the threats to Ms. Davis originated only from his codefendant. To show counsel was ineffective for failing to get this transcript, Crawford has the burden of showing that the transcript would have reflected that the motion pertained only to threats by Lindsey to Ms. Davis, thereby showing prejudice to him by the trial court's limitation on his right to cross-examine Ms. Davis. Considering that Crawford has the burden of showing counsel was ineffective, he cannot show that his right to cross-examine Ms. Davis was wrongfully impinged. Crawford has not shown that appellate counsel was ineffective for failing to get the transcript of the hearing on the motion *in limine*.

*Appendix C*

Crawford attaches a copy of an error patent brief filed by another attorney in another case, as demonstrating what should be raised in an error patent brief to comport with *Anders, supra,* and *Jyles, supra.* However, appellate counsel's errors patent brief in this case was reviewed by the Louisiana Supreme Court in its grant of *certiorari* from this court's ruling on the appeal, and the Court denied writs in this case.

Accordingly, the defendant's conviction and sentence are affirmed.

**WRIT GRANTED; RELIEF DENIED; CONVICTION & SENTENCE AFFIRMED.**

Supreme Court, U.S.
FILED
07-769 NOV 28 2007
OFFICE OF THE CLERK

No. 07-

IN THE
# Supreme Court of the United States

GEORGE CRAWFORD,

*Petitioner,*

*v.*

BURL CAIN, Warden, Louisiana State Penitentiary,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## SUPPLEMENTAL APPENDIX

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## APPENDIX — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED MARCH 17, 2005

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF LOUISIANA**

**CIVIL ACTION**

**NO. 04-0748**

**SECTION "R"(6)**

**GEORGE CRAWFORD**

**VERSUS**

**BURL CAIN,**
**Warden, Louisiana State Penitentiary**

### REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting hearings, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases. Upon review of the entire record, the court has determined that this matter can be disposed of without an evidentiary hearing. For the reasons set forth below, it is recommended that the instant petition be **DENIED**.

*Appendix*

## I. PROCEDURAL HISTORY

Petitioner, George Crawford, is a prisoner presently incarcerated in the Louisiana State Penitentiary, located in Angola, Louisiana. On January 7, 1997, Crawford, along with co-defendant, Larry Lindsey, was convicted, following trial by jury, of the first degree murder of Sherri Bailes. The following day, the jury deadlocked with respect to the penalty to be imposed and the trial court sentenced both defendants to life imprisonment without benefit of parole, probation or suspension of sentence. On March 10, 1999, the Louisiana Fourth Circuit Court of Appeal denied petitioner's direct appeal, affirming his conviction and life sentence. *State v. Lindsey,* 737 So.2d 978 (La. App. 4 Cir. 1999) (unpublished opinion). On October 15, 1999, the Louisiana Supreme Court denied petitioner's writ application, thereby rendering his conviction and sentence final. *State v. Lindsey,* 748 So.2d 463 (La. 1999).

On October 12, 2000, petitioner filed with the state trial court an application for post-conviction relief. Petitioner's efforts in this regard culminated on March 12, 2004, when the Louisiana Supreme Court denied his writ application. *State v. Crawford,* 869 So.2d 815 (La. 2004).

In the instant petition for federal habeas corpus relief, petitioner claims: 1) That insufficient evidence was submitted to support his conviction; 2) that the State failed to disclose exculpatory material and impeachment evidence; and, 3) that he was denied his right to effective

assistance of counsel. In its response, the State concedes that petitioner has exhausted his state court remedies as required under *Rose v. Lundy,* 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982),[1] but claims that the instant matter was not timely filed within the one-year statute of limitations imposed under 28 U.S.C. § 2244(d)(1).[2]

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner has one year within which to bring his habeas corpus claims pursuant to 28 U.S.C. § 2254, with this one year period commencing to run from "the latest of" either the date the petitioner's state judgment became final or the expiration of his time for seeking review.[3] *See* 28 U.S.C. § 2244(d)(1) (West 2005), as amended by the AEDPA, P.L. 104-132, 110 Stat. 1220. In this case, the parties agree that petitioner's conviction became final on October 15, 1999.[4] However, petitioner's time for seeking review did not expire until 90 days later, on January 13, 2000, when his time for filing a petition for a writ of certiorari with

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1. *See* State's response (doc. # 9) at p. 4.

2. *See* State's response (doc. # 9) at p. 13.

3. The AEDPA applies to this case as it was filed after the enactment of the AEDPA, or after April 24, 1996. *Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 2060, 138 L.Ed.2d 481 (1997).

4. *See* State's response (doc. # 9) at p. 15; *see* petitioner's reply to response (doc. # 12) at p. 2.

the United States Supreme Court ended. *See* Sup.Ct.R. 13(1); *see also Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099, 120 S.Ct. 1834, 146 L.Ed.2d 777 (2000); *Habteselassie v. Novak*, 209 F.3d 1208, 1209 (10th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 328 n.1 (4th Cir. 2000).[5] Thus, petitioner had a year from January 13, 2000, until January 13, 2001, to timely seek habeas corpus relief.

Petitioner did not file the instant action until over three years later, on March 15, 2004. Thus, petitioner's federal habeas corpus application must be dismissed as untimely, unless the one-year statute of limitations period was interrupted as set forth in 28 U.S.C. § 2244(d)(2). Under that statutory provision, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

The parties agree that petitioner filed an application for post-conviction relief with the state trial court on October 12, 2000,[6] thereby allowing 272 days of his 365-day limitation period to expire. The parties further agree

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5. In neither the State's response nor petitioner's reply is the 90 days petitioner had to seek relief from the United States Supreme Court considered in calculating the expiration of petitioner's one-year statute of limitations.

6. *See* the State's response (doc. # 9) at p. 14; *see* petitioner's reply (doc. # 12) at p. 2.

that no additional prescription days expired during the period when petitioner's post-conviction application was pending before the state trial court and later before the state appellate court.[7] However, a disagreement arises with respect to whether any prescription days expired between the time the state appellate court denied petitioner's post-conviction application and the time petitioner sought relief from the Louisiana Supreme Court.

Following the Louisiana Fourth Circuit's March 14, 2003 denial of petitioner's application for rehearing, the parties agree that petitioner had 30 days within which to timely seek relief from the Louisiana Supreme Court. The State asserts that because that 30-day time limit ended on April 13, 2003, and petitioner did not file his writ application until April 14, 2003, two additional prescription days expired.[8] Petitioner, however, in response, properly points out that his April 13, 2003 deadline fell on a Sunday and, under applicable state law, filing deadlines which fall on weekends are extended to the next business day which, in this case, was Monday,

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7. *See* the State's response (doc. # 9) at p. 14; *see* petitioner's reply (doc. # 12) at pp. 2-3.

8. *See* the State's response (doc. # 9) at p. 14. Under *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001), once the allotted time for seeking review has lapsed, a state post-conviction proceeding "ceases to be pending," and therefore, ceases to interrupt prescription.

April 14, 2003, the date petitioner filed his writ application with the Louisiana Supreme Court.[9] Accordingly, petitioner's writ application was not untimely and no additional prescription days expired.

Following the Louisiana Supreme Court's March 12, 2004 denial of petitioner's writ application, the parties agree that prescription, once again, commenced to run.[10] After three more prescription days expired, petitioner, on March 15, 2004, filed the above-captioned habeas petition. Because, at that point, 90 days of petitioner's 365-day prescriptive period remained, the instant action is clearly not time barred.

## II. FACTS[11]

Anthony Graffeo testified that on September 22, 1994, while employed as a New Orleans Police Department Homicide Detective, he was dispatched to the Fischer Housing Project to investigate a shooting.[12]

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9. *See* petitioner's reply (doc. # 12) at p. 3.

10. *See* the State's response (doc. # 9) at p. 14; *see* petitioner's reply (doc. # 12) at p. 3.

11. The facts set forth herein are based upon this court's review of the trial testimony and the Louisiana Fourth Circuit Court of Appeal's opinion, *State v. Crawford*, 848 So.2d 615 (La. App. 4 Cir. 2003), denying petitioner relief in connection with his application for post-conviction relief.

12. Approximately a year and a half prior to petitioner's trial, Graffeo left the New Orleans Police Department to become a Louisiana State Trooper.

Upon his arrival on the scene, Graffeo was informed that two people, later identified as Sherri Bailes and Elijah Mitchell, had been shot and had been taken to Charity Hospital.[13] Thereafter, Graffeo observed two vehicles in the area, one of which was a black corvette in which the two victims had been sitting at the time they were shot. Graffeo stated that the back window of the corvette had been "blown out", that there were "pool[s] of blood" on both the front seats, and that "a piece of cocaine" wrapped in cellophane was found on one of the seats.[14] Graffeo also observed, in the area around the black corvette, several "spent" nine millimeter casings.[15] The fact that several shots were fired was confirmed by New Orleans Police Officer Byron Winbush, a firearms expert. Winbush testified that two nine millimeter bullets were recovered from Bailes' body during the autopsy and 12 nine millimeter cartridge casings were found on the scene.[16] Based upon his testing of the casings, which reflected that they did not all come from the same gun, Winbush concluded that two guns were involved in the pertinent shooting.

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13. Bailes later died from her gunshot wounds, but Mitchell survived.

14. *See* State rec., vol. 3 of 5, trial transcript at pp. 43-44 and p. 59.

15. *See* State rec., vol. 3 of 5, trial transcript at p. 44.

16. *See* State rec., vol. 3 of 5, trial transcript at p. 66.

*Appendix*

Graffeo testified that shortly after the shooting, it was unknown whether or not anyone had seen what happened. However, on the second day of his investigation, Shirley Davis stepped forward, advising that she had witnessed the shooting. Davis informed that there were two shooters, one of whom she identified as Larry Lindsey, a person she knew. However, Davis knew the second shooter only by his first name, "George".[17]

Following Davis' identification, Graffeo put together a photographic lineup which contained a photograph of Larry Lindsey, along with five other potential suspects.[18] From this lineup, Davis picked out Lindsey's photograph, identifying him as one of the shooters.[19]

Following Davis' photographic identification, a warrant was issued for Lindsey's arrest. It was following Lindsey's arrest that Graffeo learned that the second shooter's last name was "Crawford".[20] Upon learning the second shooter's first and last names, a second photographic lineup was created. Upon seeing this

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17. *See* State rec., vol. 3 of 5, trial transcript at p. 47.

18. Graffeo informed that initially, having only the first name of the second shooter, he was not able to put together a second photographic lineup for purposes of identifying the second shooter. *See* State rec., vol. 3 of 5, trial transcript at p. 48.

19. *See* State rec., vol. 3 of 5, trial transcript at p. 48.

20. *See* State rec., vol. 3 of 5, trial transcript at p. 50.

second photographic lineup, Davis identified Crawford as the second shooter.[21]

The eyewitness, Shirley Davis, a resident in the Fischer Housing Project, testified that on the date at issue, she observed two men, wearing bandanas, get out of a car, each with a gun in his possession.[22] She continued to observe the two men, watching them walk through a nearby breezeway, then commence shooting at two persons sitting in a black corvette.[23] After shooting several shots, the two men walked back to their car and drove away.[24]

Following the shooting, Davis went inside, where she stayed when police arrived on the scene. It was not until the following day that she approached the investigating police officers, informing that she had witnessed the shooting.[25]

Upon informing police that she had seen what happened, Davis was taken to the homicide division where she gave officials a statement. It was at that time

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21. *See* State rec., vol. 3 of 5, trial transcript at pp. 103-104.

22. *See* State rec., vol. 3 of 5, trial transcript at pp. 110, 113 and 114.

23. *See* State rec., vol. 3 of 5, trial transcript at pp. 112-113.

24. *See* State rec., vol. 3 of 5, trial transcript at pp. 113-114.

25. *See* State rec., vol. 3 of 5, trial transcript at pp. 114-115.

that she provided police with the full name, "Larry Lindsey", of one of the shooters, and the first name, "George", of the other shooter.[26] Shortly thereafter, a photographic lineup was presented to her and she picked out the photograph of Larry Lindsey, identifying him as one of the shooters.[27] A couple of months later, she returned to the homicide division where she was presented another photographic lineup. It was during this lineup that she picked out the photograph of petitioner, George Crawford, identifying him as the second shooter.[28]

Elijah Mitchell, who admitted to being a convicted felon and, at the time of trial, was incarcerated in Texas in connection with a probation violation, testified that on the date at issue, he and Bailes were sitting in her black corvette arguing with one another. During the argument, Mitchell noticed someone walking toward the car and turned to see who it was. At that point, before he really saw who was approaching the car, Mitchell was shot in the head.[29] Following this first shot, Mitchell stated that he "turned completely around" and recognized the two shooters, knowing both their first

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26. *See* State rec., vol. 3 of 5, trial transcript at p. 115.

27. *See* State rec., vol. 3 of 5, trial transcript at pp. 115-116.

28. *See* State rec., vol. 3 of 5, trial transcript at p. 117.

29. *See* State rec., vol. 3 of 5, trial transcript at pp. 77-78.

and last names.[30] Mitchell stated that he had met the two shooters, Larry Lindsey and George Crawford, approximately a month before the shooting and admitted to having had arguments with both men, the last argument taking place only two days before the shooting.[31] Mitchell estimated that he was shot a total of ten times.[32]

As a result of his gunshot wounds, Mitchell remained in the hospital approximately two weeks. Following his release, a police detective came to his home and showed him two sets of photographs. From the first set, he picked out a photograph of Larry Lindsey, identifying him as one of the shooters. From the second set, he picked out petitioner's photograph, identifying him as the second shooter.[33]

## III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") includes a comprehensive overhaul of federal habeas corpus legislation, including 28 U.S.C. § 2254. Amended subsections 2254(d)(1) and (2) contain

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30. *See* State rec., vol. 3 of 5, trial transcript at pp. 78, 79 and 81.

31. *See* State rec., vol. 3 of 5, trial transcript at pp. 81 and 83.

32. *See* State rec., vol. 3 of 5, trial transcript at p. 80.

33. *See* State rec., vol. 3 of 5, trial transcript at pp. 81-83.

revised standards of review for questions of fact, questions of law and mixed questions of fact and law where there has been an adjudication on the merits in State court proceedings.

State court determinations of questions of law and mixed questions of law and fact are reviewed under 28 U.S.C. § 2254(d)(1) and receive deference unless they were "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). The United States Supreme Court has advised that:

> Under the "contrary to" clause, a federal habeas corpus court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

*Williams v. Taylor*, 529 U.S. 1056, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000); *Hill*, 210 F.3d at 485. Questions of fact found by the state court are "presumed to be correct . . . and we will give deference to the state court's

decision unless it 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Hill*, 210 F.3d at 485, *quoting* 28 U.S.C. § 2254(d)(2).

## IV. ANALYSIS

### A. INSUFFICIENCY OF EVIDENCE

When conducting a post-AEDPA sufficiency of the evidence review, a federal court may grant relief only if it determines that the state court decision rested on an "unreasonable application" of clearly established Federal law, as determined by the Supreme Court, to the facts of the case. *See* 28 U.S.C. § 2254(d)(1).

In its analysis of petitioner's insufficiency of evidence claim, the Louisiana Fourth Circuit Court of Appeal first set forth the applicable law, stating:

> In *State v. Sellers*, 2001-1903, p. 4 (La.App. 4 Cir. 4/10/02), 818 So.2d 231, 234, this court provided the general test for determining the sufficiency of evidence:
>
> > When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a

> reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Cummings,* 95-1377 (La.2/28/96), 668 So.2d 1132, 1134. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. A reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *State v. Smith,* 600 So.2d 1319, 1324 (La.1992).

*Crawford,* 848 So.2d at 621.

The state appellate court then examined the State's burden of proof, i.e., the essential elements of the applicable crime, along with the basis of Crawford's claim that the State failed to satisfy its burden of proof.

> Crawford was convicted of first-degree murder, which is defined in pertinent part by La. R.S. 14:30 as the killing of a human being "[w]hen the offender has the specific intent to kill or to inflict great bodily harm upon more than one person." La. R.S. 14:30A(3). In the present case, the physical evidence proved

> that the perpetrators killed Ms. Bailes while trying to kill or inflict great bodily harm on Mr. Mitchell. Crawford does not argue that the State failed to prove that a first-degree murder occurred. Instead, Crawford argues the State failed to prove he was one of the men who committed the first-degree murder.

*Crawford*, 848 So.2d at 621-622.

In support of his claim that the State failed to prove that he was one of the men who murdered Sherri Bailes, petitioner attacks the credibility of the two eyewitnesses, Shirley Davis and Elijah Mitchell. Petitioner claims that their divergent stories with regard to the murder of Sherri Bailes render their testimony "mutually exclusive". As such, the jury "had no choice except to believe one version of the shooting or the other" and, based upon their lack of credibility, neither of their versions of events were sufficient to support his first-degree murder conviction. *See Crawford*, 848 So.2d at 622; *see also* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 11.

In support of the above argument, petitioner asserts that while Mitchell testified that "the accomplice [i.e., petitioner] did not begin shooting until he was immediately alongside Bailes' car", Davis testified that "Lindsey's accomplice shot from a porch more than 50 feet away from Bailes' car".[34] However, as shown

34. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 11.

below, petitioner has exaggerated the inconsistency between the two witnesses's accounts.

A close review of the trial transcript reflects testimony from Mitchell to the effect that following the first shot, which hit him in the head, he "turned **completely** around", saw the two shooters, then was hit with two shots to his face and one in his shoulder.[35] The fact that Mitchell had to turn "completely around" to see the shooters, rather than turning slightly to his right to look out the passenger side window, reflects that the shooters were behind the car, rather than alongside it, when they commenced firing. With respect to Davis, she testified, in pertinent part, as follows:

> Q. What did they [i.e., the perpetrators] do when they got to the breezeway, did you see?
>
> A. Went on through the breezeway.
>
> Q. What happened after **they got all the way through the breezeway?**
>
> A. When they **got to the front [of the breezeway] that's when they had started shooting.**[36]

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35. *See* State rec., vol. 3 of 5, trial transcript at p. 78 (emphasis added).

36. *See* State rec., vol. 3 of 5, trial transcript at p. 112 (emphasis added).

Thus, while the shooters, according to Davis, may have been on the porch or the breezeway leading to the street when they started shooting, they were at the end of the breezeway, about to step onto the street where the black corvette was located.

The Louisiana Fourth Circuit Court of Appeal, in rejecting the above claim, likewise recognized petitioner's exaggeration with respect to the alleged inconsistency, reasoning:

> Crawford initially points to the testimony of Ms. Davis that the perpetrators only shot from the porch area of the courtyard, in contrast to Mr. Mitchell's testimony that the men were walking up to him when they began shooting at the car. However, Ms. Davis testified that she saw the perpetrators **begin** shooting when they were walking through the breezeway. In addition, when later asked if all shots were fired from the porch, she replied that the perpetrators "came up off the porch" when they were shooting.

*Crawford*, 848 So.2d at 622 (emphasis original).

Petitioner attacks Davis' credibility based upon her allegedly contradictory testimony as to whether she actually witnessed the shooting at issue.[37] However, as

37. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p.11.

the Louisiana Fourth Circuit explained, when Davis' seemingly contradictory responses are read in context, i.e., are read in connection with the question prompting her response, there is, in fact, no contradiction in her testimony.

> Ms. Davis first testified that she saw the perpetrators shooting when they got to the front of the breezeway and that the perpetrators were still walking through the breezeway when they began shooting. She also testified that she saw both perpetrators firing. Crawford claims that Ms. Davis' testimony is inconsistent as to whether she saw the shooting at the front of the building. The prosecutor asked Ms. Davis: "[Y]ou didn't see who did the shooting outside in front of the building on Thayer? Is that correct?" Ms. Davis replied, "Yes." Although Crawford describes this testimony as Ms. Davis admitting she did not see any of the shooting, the question presented [to] her was whether she saw the shooting after the perpetrators exited the breezeway and walked to the front of the building, where Ms. Davis insisted at trial she did not go. Her answer that she did not see the shooting after the perpetrators got to the front of the building does not contradict her testimony that she saw the perpetrators shooting in the breezeway.

*Crawford*, 848 So.2d at 622.

Petitioner further complains that Davis lacked credibility due to her allegedly inconsistent testimony regarding whether the perpetrators had their faces covered when they got out of their car. A review of the pertinent testimony reflects that when Davis was asked, ". . . when they first got out of the car, did they already have the bandannas on?" Davis replied, "Yes, they did."[38] Later, Davis stated that the perpetrators put bandannas over their mouths "as soon as they got out of the car."[39] However, such an inconsistency, if it can even be considered an inconsistency, did not, as the Louisiana Fourth Circuit concluded, "render [Davis's] testimony unbelieveable." *Crawford*, 848 So.2d at 622.

Next, petitioner challenges Davis' credibility based upon his claim that her testimony was in conflict with the physical evidence uncovered at the crime scene. Specifically, Davis' "testimony that the shooters fired from the porch more than 50 feet away from Bailes' car cannot be reconciled with the fact that spent shell casings were found only in the street and in Bailes' car, not near the porch. Her testimony in this regard is also in direct conflict with the forensic evidence presented by the coroner, which showed steep downward-angled bullet wounds that could not have been inflicted by shooters firing from the porch."[40] However, as the Fourth Circuit

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38. *See* petitioner's Exhibit A at Bates-stamped p. 241.

39. *See* petitioner's Exhibit A at Bates-stamped p. 258.

40. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at pp. 11-12 (footnote omitted).

explained, the above-described physical evidence is not in conflict with Davis' testimony in that Davis never claimed to have followed the shooters to the front of the building and onto the street, witnessing all of the shots fired in connection with the murder of Sherri Bailes. Instead, "her only viewpoint during the shooting was in the breezeway, where she testified that the shooting began." *Crawford*, 848 So.2d at 622. Once the shooters ascended from the breezeway onto the street, continuing to fire their guns, Davis ceased to be a witness.

Next, petitioner seeks to discredit Davis and Mitchell by virtue of testimony on their part which petitioner considers to be incredible such as: 1) Davis' testimony that she did not discuss the shooting with anyone until she contacted Detective Graffeo the following day; 2) Mitchell's testimony that after he was shot in the head, he was able to turn around in his seat and see the two shooters "while being riddled with bullets"; 3) Mitchell's testimony that he saw petitioner the day before the shooting wearing the same clothes he wore on the day of the shooting; and, 4) Mitchell's testimony that despite the fact that he had been shot ten times, he would have been able to discuss the matter with police at the crime scene shortly after the shooting occurred if anyone had approached him for questioning. Additionally, petitioner contends that "Mitchell's extensive criminal record . . . should have caused the jury to view his testimony with additional skepticism."[41]

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41. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at pp. 12-13.

The fact that petitioner believes the above-described testimony was incredible and that Mitchell's credibility was damaged by virtue of his criminal record, is, practically speaking, irrelevant. As the Fourth Circuit reasoned, in connection with petitioner's challenge to Davis' testimony that she did not discuss the shooting with anyone prior to contacting police, "[a]lthough Crawford finds this testimony suspect, there was no evidence presented at trial to show that Ms. Davis discussed the shooting prior to that time." *Crawford*, 848 So.2d at 622. In response to petitioner's charge that Mitchell's identification of the shooters after being shot in the head was "'patently unbelieveable'", the state appellate court reasoned:

> [T]he jury was aware of the fact that Mr. Mitchell was shot in the head, and it apparently chose to believe his testimony. A fact finder's credibility decision should not be disturbed unless it is clearly contrary to the evidence. In the present case, the jury was able to observe Mr. Mitchell's demeanor while testifying. In addition, Mr. Mitchell knew both defendants, and he testified that he was shot as he turned his head toward the men.

*Crawford*, 848 So.2d at 623.[42] Mitchell's testimony that

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42. Though not directly addressed by the state appellate court, the same reasoning is applicable to petitioner's claim of incredibility with respect to Mitchell's testimony that he saw petitioner the day before the shooting in the same clothes he (Cont'd)

he was capable of speaking with police at the crime scene was of little import in light of the stipulation entered into by the prosecution and defendants that "the responding officers would testify that neither victim was able to give a statement at the scene." *Id.*[43] Finally, with respect to Mitchell's prior convictions, the Fourth Circuit reasoned: "[T]he jury was aware of [his prior convictions] but chose to believe Mr. Mitchell's testimony. The jury as fact finder makes credibility calls, and the jury must have concluded that Mr. Mitchell's prior convictions did not render his testimony unbelievable."*Id.*

Finally, in support of his claim that the testimony of Davis and Mitchell was "mutually exclusive", petitioner points to discrepancies between their descriptions of the weapons the shooters used and the clothes they were wearing. Petitioner asserts that Davis described the gun allegedly in his possession as "a long assault weapon" and said that he was wearing "a dark colored long sleeve shirt, blue jeans, and a blue bandana." In contrast, Mitchell described the pertinent weapon as "a small handgun" and said the shooter wore "a light colored t-shirt and tan pants, possibly shorts." [44] However, as the

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(Cont'd)
was wearing on the day of the shooting. There was no evidence clearly contrary to Mitchell's testimony and therefore, a finding of credibility on the part of the jury should not be disturbed.

43. *See* State rec., vol. 3 of 5, trial transcript at pp. 160-161.

44. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 11.

court explained in *Gibbs v. Kemna*, 192 F.3d 1173, 1175-1176 (8th Cir. 1999), *cert. denied*, 531 U.S. 846, 121 S.Ct. 116, 148 L.Ed.2d 72 (2000), discrepancies in witnesses's descriptions of an assailant "relate to the reliability or credibility of witnesses, not to the sufficiency of the evidence." In the instant action, the prosecution presented two eyewitnesses who unequivocally testified that petitioner was one of the shooters, both picking petitioner's photograph out of photographic lineups. The testimony of either witness, if believed by the jury, would be sufficient evidence that petitioner was the perpetrator of the crime at issue. As the *Gibbs* court reasoned:

> Although there was conflicting evidence presented to the jury concerning the witnesses's credibility, we must presume that the jury resolved any conflicting inferences in favor of the prosecution. *[Jackson]*, 443 U.S. at 326. . . . [Petitioner's] factual arguments that [the witnesses] could [not] be believed goes to their credibility, not to the substantiality of the evidence, and credibility is for the jury to decide. *Daniels v. Wood*, 819 F.2d 195, 198 (8th Cir.1987).

*Gibbs*, 192 F.3d at 1176.

Based upon the above, the court finds that the Louisiana Fourth Circuit Court of Appeal's rejection of petitioner's insufficiency of evidence claim does not represent an unreasonable application of Supreme Court law, specifically, *Jackson v. Virginia*, *supra*, to the facts

of this case. Accordingly, the court finds that the instant claim for federal habeas corpus relief is without merit.

## B. FAILURE TO DISCLOSE IMPEACHMENT EVIDENCE

Petitioner contends that the State withheld evidence which, if known by defense counsel, could have been used to impeach the credibility of eyewitnesses Shirley Davis and Elijah Mitchell, along with investigating detective, Anthony Graffeo. According to petitioner, the suppression of this impeachment evidence, viewed collectively, undermined confidence in the jury's guilty verdict.

In addressing this issue, the Louisiana Fourth Circuit Court of Appeal first examined the applicable law.

> To comport with the dictates of the due process clause of the Fourteenth Amendment, the State must disclose to the defense evidence that is favorable to the defense and is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Porter*, 98-0279 (La.App. 4 Cir. 3/15/00), 756 So.2d 1156, *writ denied*, 2000-1135 (La.1/10/02), 790 So.2d 3. Included in this rule is evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d

104 (1972). "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial, that is, evidence favorable to the defendant which is material to guilt or punishment." *State v. Rosiere*, 488 So.2d 965, 970 (La.1986). *See also Porter, supra.*

Materiality was defined in *U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985): "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." The same test is to be employed whether or not the defense makes a pretrial request for exculpatory evidence. *Bagley; State v. Phillips*, 92-1063 (La.App. 4 Cir. 2/29/96), 670 So.2d 588, *writ denied*, 96-2131 (La. 9/5/97), 699 So.2d 85.

In *Kyles v. Whitley*, 514 U.S. 419, 434-435, 115 S.Ct. 1555, 1565-1566, 131 L.Ed.2d 490 (1995), the Court discussed "materiality":

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed

evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).... *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381.

The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting

> the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

*Crawford*, 848 So.2d at 623-624.

**1. Impeachment of Davis[45]**

Petitioner claims that several of Davis' pre-trial representations constitute evidence which the State was required to reveal to the defense as a result of their impeachment value. Petitioner points to the supplemental police report prepared by Detective Graffeo[46] which reflects that Davis informed Graffeo that

45. In the ensuing discussion, the specific evidence allegedly suppressed by the State is discussed individually, on an item by item basis. However, the court is mindful of its obligation, as set forth in *Kyles*, 514 U.S. at 436, 115 S.Ct. at 1567, that said evidence must be considered collectively for purposes of determining the requisite materiality required under *Brady*.

46. *See* petitioner's Exhibit A at Bates-stamped pp. 419-437.

the second shooter's name was "George Ascort". Compare this information with a transcription of an interview between Graffeo and Davis on September 23, 1994,[47] the day after Bailes' murder, which reflects that Davis provided Graffeo with the name of "George Caldwell". At trial, Davis represented that she only knew the second shooter as "George", she did not know his last name.[48] Petitioner contends that a comparison of the above evidence would have damaged Davis' credibility, in particular, her identification of petitioner as one of the shooters "because it showed she had possibly identified two other men as Lindsey's accomplice." *Crawford*, 848 So.2d at 628. For the following reasons, the court disagrees.

First, when one reads Davis' pre-trial comments in context, it is clear that her alleged "identification" of the second shooter as "George Ascort" or "George Caldwell" was far from positive and was based not upon her personal knowledge, but rather, upon conjecture swirling around shortly after the incident with respect to the identity of the second, unknown shooter. Graffeo's supplemental police report reflects that at 11:15 a.m., on the day following the shooting, Graffeo received a telephone call from "a black female who refused to identify herself", who informed that the first name of one of the gunman was "George", and his last name was

47. *See* petitioner's Exhibit A at Bates-stamped pp. 470-478.

48. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 14.

possibly "Jefferson".[49] Less than an hour later, at 12:05 p.m., Graffeo was contacted via telephone by Lester Mitchell, Elijah Mitchell's uncle, informing "that he had heard on the street from an unknown source that the perpetrators who shot his nephew were Larry Lindsey, black male, approximately 21 years of age, 6'2" tall, thin build, dark skin, and has four gold teeth in his mouth, and George, possible last name Ascort, black male, approximately 19 years of age, 6'4" tall, heavy build, and also has four gold teeth in his mouth."[50] Less than two hours later, at 1:50 p.m., Davis, apparently having heard the same information "on the street" that Lester Mitchell heard, telephoned Graffeo and informed "that the perpetrators were Larry Lindsey, black male, and George Ascort, black male."[51] Despite her apparent certainty, less than three hours later, when initially asked by Graffeo whether or not she knew the second perpetrator, Davis responded in the negative.

> Q: Do you know the second perpetrator[]?
>
> A: No.[52]

Later, in the same interview, Davis identifies the second perpetrator as "George Caldwell". This alleged

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49. *See* petitioner's Exhibit A at Bates-stamped p. 430.

50. *See* petitioner's Exhibit A at Bates-stamped p. 431.

51. *See* petitioner's Exhibit A at Bates-stamped p. 431.

52. *See* petitioner's Exhibit A at Bates-stamped p. 474.

identification, however, is not based upon Davis' personal knowledge.

> Q. Which one was that?
>
> A. That's George.
>
> Q. George. Do you know him as George or that's just what you heard?
>
> A. No, I got the whole name, George Caldwell.
>
> Q. Okay, bu[t] you don't know that for a fact . . . you just. . . .
>
> A. I know that . . . **people around there know that's his name.**[53]

As the Fourth Circuit pointed out, the above pre-trial evidence is not really in conflict with Davis' trial testimony in that, in both her trial testimony and her pre-trial representations, her identification of the second shooter was uncertain and the jury was well-aware of that uncertainty. *Crawford*, 848 So.2d at 628. Further, the materiality of the alleged conflict is significantly undermined by the consistency of Davis' pre-trial and trial identifications of petitioner as the second shooter. As the Fourth Circuit noted: "In a [pre-trial] photographic lineup and at trial, Ms. Davis positively

53. *See* petitioner's exhibit A at Bates-stamped p. 476 (emphasis added).

identified Crawford as the George who committed the murder with Lindsey." *Id.* Based upon the above, the court does not find the above-described information was such that the State was required, under *Giglio, supra,* to turn it over as a result of its impeachment value.

Petitioner points to more differences between Davis' trial testimony and her September 23, 1994 interview in an effort to support his claim that the September 23, 1994 interview should have been turned over to the defense. Petitioner notes that Davis, at trial, testified that Larry Lindsey, at the time of the shooting, was wearing a purple hooded sweatshirt while petitioner was wearing a "dark colored" sweatshirt.[54] In contrast, Davis, during her interview, stated that Lindsey was wearing a "dark colored" shirt and petitioner was wearing a "purple and white shirt" with a hood on it.[55] Petitioner further notes that Davis testified at trial that when the perpetrators got out of their car, "they had guns in their hands."[56] However, during her interview, she stated that she "couldn't really tell" whether they had guns when they got out of their car.[57]

The Louisiana Fourth Circuit, in addressing petitioner's claim, placed the above-described

54. *See* petitioner's Exhibit A at Bates-stamped pp. 257-258.

55. *See* petitioner's Exhibit A at Bates-stamped pp. 475-476.

56. *See* petitioner's Exhibit A at Bates-stamped p. 227.

57. *See* petitioner's Exhibit A at Bates-stamped p. 472.

differences in proper perspective, reasoning: "[D]iscrepancies concerning who wore which shirt and whether the guns were in the perpetrators' hands as they exited their car are distinctions that would not harm [Davis'] credibility. Both Ms. Davis and Mr. Mitchell testified that both men were armed and both shot at the car." *Crawford,* 848 So.2d at 629. Further, Davis' uncertainty as to what the shooters were wearing, like her uncertainty as to the second shooter's last name, is relatively insignificant when compared with her positive identification of both shooters at pre-trial photographic lineups as well as at trial. Accordingly, the State's failure to provide the defense with a transcript of Davis' September 23, 1994 interview did not constitute a violation of petitioner's constitutional rights.

Petitioner claims that Davis' pre-trial interview and trial testimony differed with respect to: 1) Who witnessed the shooting; 2) Davis' actions following the shooting; and, 3) the location of the shooters when they commenced firing at the victim's car. With respect to the alleged witnesses, petitioner asserts that Davis, at trial, stated "that a number of her family members witnessed the shooting . . . while in the interview she said she did not know any of the witnesses".[58] However, this claim is not precisely correct. At trial, Davis, on cross-examination, responded in the affirmative when defense counsel queried: "But you told [police] that your auntie was in the car and she saw the same thing that you saw?" However, she did not state at trial that any other family

58. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 15.

member "saw the same thing that [she] saw." The only other family member who was mentioned in connection with this particular line of questioning was Davis' mother who, according to Davis, was in the breezeway along with "[a] lot of people", and saw the shooters walk through the breezeway.[59] Similarly, petitioner, during her pre-trial interview, stated:

> Q. Did you observe anyone else out there at the time of the shooting?
>
> A. Had a lot of people outside.
>
> Q. Any body in particular, or just a crowd from the area?
>
> A. A crowd of people from the area.[60]

Petitioner's claim that Davis offered different information at her pre-trial interview and at trial with respect to her actions following the shooting is likewise misleading. A careful examination reflects that at trial, Davis was questioned with respect to her actions immediately following the shooting, prior to the time the shooters drove away in their car.

> Q. Now, what did you do immediately after the shooting?

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59. *See* petitioner's Exhibit A at Bates-stamped p. 251.

60. *See* petitioner's Exhibit A at Bates-stamped p. 477.

A. Went inside.[61]

Q. Okay. So, did you ever walk outside through the breezeway where the **two cars** [i.e., the shooters' car and the victim's car] are parked? Did you ever come out to look?

A. What, where the shooting was?

Q. Yes.

A. No.[62]

In contrast, the pertinent questions posed to Davis during her interview seemingly concerned her actions after the shooters had left the area. Davis was questioned regarding the total number of shots the perpetrators had fired and whether she had heard the perpetrators say anything and, finally, whether she had observed the victim. To this last inquiry, Davis responded affirmatively, explaining: "[W]hen I went over there, she [i.e., Bailes] was just . . . she ain't [sic] even move and when I looked at her, I saw she was gone, and when I see [sic] him [i.e., Mitchell], grasping [sic] for his breath, trying to say something out [of] his mouth".[63]

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61. *See* petitioner's Exhibit A at Bates-stamped p. 231.

62. *See* petitioner's Exhibit A at Bates-stamped p. 247.

63. *See* petitioner's Exhibit A at Bates-stamped p. 473.

Finally, petitioner, once again, claims that at trial Davis testified that the shooters shot at the victim's car "from the porch" and that "she didn't see the shooting at all"; whereas, during her pre-trial interview she stated that the shooters "ran up on the car and started shooting".[64] However, as explained earlier, petitioner's contention that Davis, at trial, stated that she did not see the shooting and that the shots were fired from the porch or breezeway, is inaccurate.[65] Similarly, petitioner's contention as to what Davis stated in her pre-trial interview is misleading because it is taken out of context. Davis' response that they "ran up on the car and started shooting" was provided in response to Detective Graffeo's leading question regarding whether Davis could describe the perpetrators actions "[w]hen they ran to the car and started shooting".[66] When Graffeo, shortly thereafter, posed the following neutral question: "[W]here were they shooting from . . .", Davis responded: "They both was [sic] like, you know, where the breezeway [sic] [is] . . . , they was [sic] like right there".[67] Thus, once again, contrary to petitioner's suggestion, Davis' trial testimony and pre-trial interview were essentially in sync.

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64. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 15.

65. *See* discussion *supra* at pp. 13-14.

66. *See* petitioner's Exhibit A at Bates-stamped p. 472.

67. *See* petitioner's Exhibit A at Bates-stamped p. 473.

Petitioner next claims that information in Graffeo's supplemental report reflecting that "Davis was unwilling to provide a recorded statement unless the N.O.P.D. arranged for a new apartment for her outside the Fischer project" constituted material which could have been used to impeach Davis since it contradicted her trial testimony to the effect that police made no promises to her in exchange for which she picked petitioner's photograph from a photographic lineup.[68] According to petitioner, "[h]ad the jury known that Davis demanded a new apartment for herself before she gave her statement, ... it could have reasonably inferred that Davis came forward in order to secure new housing."[69]

In his supplemental report, Graffeo provided, in pertinent part: "Davis stated that she witnessed the murder of Sherri Bailes and was scared for her life **because the perpetrators were threatening her**. . . . Davis stated . . . that she would come forward and give a statement only if she could be relocated from the Fischer Housing Project."[70] As the Fourth Circuit pointed out in addressing petitioner's argument, had petitioner had access to the above information, presenting it to the jury would have done him more harm than good in that it would have opened the doors for the prosecution to

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68. *See* petitioner's Exhibit A at Bates-stamped pp. 234-235.

69. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 15.

70. *See* petitioner's Exhibit A at Bates-stamped p. 431 (emphasis added).

question Davis regarding alleged threats made against her by the murder suspects.

> The supplemental report indicates that the reason why Ms. Davis wanted the new apartment was because she had been threatened by the perpetrators, and the court had already ruled that no evidence of any threats could be presented unless the defense questioned Ms. Davis concerning why she waited until the next day to contact the police. Asking her about this condition of giving the statement would fall within this exception to the prohibition on presenting evidence of the threats.

*Crawford*, 848 So.2d at 629. Additionally, the Fourth Circuit noted that Davis' trial testimony to the effect that "she received nothing from the police" was, in fact, accurate since Davis "rejected the apartment offered to her". *Id.*

Petitioner next argues that a 911 log reflecting a witness's statement to the effect that the perpetrators ran from the crime scene, in contrast to Davis' testimony that they walked from the scene, constitutes material which could have been used to impeach Davis. However, as the Louisiana Fourth Circuit noted, the two witnesses's accounts are more similar than different in that they both relate "that the perpetrators left the scene." Further, the state appellate court reflected that the 911 log would arguably "be inculpatory because flight is an indication of guilt." *Id.*

## 2. Impeachment of Mitchell

As with Davis, petitioner contends that Mitchell's pre-trial statements could have been used against him since, in these statements, Mitchell represented that he did not know "George's" last name,[71] but at trial, Mitchell stated that he knew both Crawford's first and last names.[72] However, as was the case with respect to the alleged inconsistency between Davis' trial testimony and her pre-trial statements, the materiality of the above-described inconsistency is significantly undermined by virtue of Mitchell's consistent identification of petitioner as one of the shooters and consistent statements to the effect that he knew petitioner. As the Fourth Circuit reasoned:

> [I]n both the statement and in his trial testimony Mr. Mitchell stated he knew George because George hung around his neighborhood with Lindsey, whom he identified by both first and last names. In his statement, Mr. Mitchell described Lindsey and the defendant as the neighborhood "bullies" with whom he had argued several times, the last time being two days before the shooting. Whether or not Mr. Mitchell knew Crawford's last name, in both his statement and in his testimony at trial he stated he knew both

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71. *See* petitioner's Exhibit A at Bates-stamped p. 488.

72. *See* petitioner's Exhibit A at Bates-stamped p. 195.

> Lindsey and Crawford from the neighborhood. He positively identified Crawford in the photographic lineup and in trial as one of the perpetrators. Mr. Mitchell's statement as to whether he knew George's last name was inconsequential with respect to Mr. Mitchell's physical identification of Crawford as one of the perpetrators based on Crawford's physical appearance, regardless of his name.

*Crawford,* 848 So.2d at 626.

Petitioner next complains that there was a conflict between Mitchell's trial testimony and his pre-trial statement regarding where petitioner was located when Mitchell saw him shooting at Bailes' car. According to petitioner, Mitchell, at trial, testified that petitioner "shot at him from directly outside the passenger side window", but prior to trial Mitchell stated that petitioner "shot at him from the rear of Bailes' car".[73]

As the court noted in connection with petitioner's insufficient evidence claim, a close review of the trial transcript reflects testimony from Mitchell to the effect that following the first shot, he "turned **completely** around" and saw the two shooters.[74] The fact that Mitchell turned "completely" around to see the shooters

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73. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 16.

74. *See* State rec., vol. 3 of 5, trial transcript at p. 78 (emphasis added).

reflects that the shooters were behind the car rather than on the side of it. As such, the alleged inconsistency between Mitchell's pre-trial statement and trial testimony was negligible. Further, to the extent Mitchell was inconsistent, said inconsistency was inconsequential in the face of his positive, consistent identification of petitioner as one of the shooters.

Petitioner next complains that Mitchell's pre-trial statement should have been produced because in it he stated that petitioner "used a 'small caliber' handgun - differentiating it on the basis of caliber from Lindsey's nine-millimeter gun, which he recognized".[75] This is significant, according to petitioner, "because only nine-millimeter casings were recovered at the scene. Mitchell's credibility ... would have been severely undermined by such impeachment."[76] However, even without Mitchell's pre-trial statement, petitioner received the benefit of any damage to Mitchell's credibility arising from his observation with respect to the difference in size between petitioner's gun and Lindsey's gun since Mitchell testified at trial that petitioner's gun was smaller than Lindsey's.

> Q. Okay. Did they have anything in their hand when you saw them?

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75. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 16.

76. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at pp. 16-17.

A. Yes.

Q. What did they have?

A. Each one had a gun.

Q. Did you get a look at what the gun looked like, what type of guns they were?

A. I seen [sic] the one Larry had. It was a black gun. I couldn't make it out at that time but I knew it was a gun but I had already been shot then. I said I knew it was a gun. I knew what type of gun it was at the time I seen [sic] it though.

Q. What type of gun was it?

A. It was a Tech 9.

Q. Did you see what kind of gun - first of all, did George have a gun?

A. Yes, **it was a smaller gun than [the one] Larry had.**[77]

Petitioner next contends that had the 911 log been produced, it could have been used to impeach Mitchell since the description of the perpetrator's clothing set forth in the log differed from Mitchell's description.

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77. *See* State rec., vol. 3 of 5, trial transcript at p. 79 (emphasis added).

However, as the Fourth Circuit pointed out, in making the above argument, "Crawford ignores the fact that Ms. Davis' description of the perpetrators' clothing more closely matched that given in the 911 log, [thus, the 911 log supported Davis' credibility], and the jury heard her testimony on this point and was aware that it contradicted that of Mr. Mitchell. [Thus,] [t]he jury was aware of these divergent descriptions. . . ." *Crawford*, 848 So.2d at 627.

Next, petitioner claims that Davis' pre-trial statement would have provided him with excellent impeachment material against Mitchell since Mitchell stated that shortly after the shooting, he was conscious and could have identified the perpetrators at that time if anyone had asked him to do so while Davis, in her pre-trial statement, represented that she observed Mitchell, following the shooting, "gasping for breath and fighting for life".[78] However, even without Davis' pre-trial statement, the jury was already aware of "Mitchell's true condition" by virtue of "the stipulation given to the jury that if the officers who responded to the scene were to testify, they would state that neither victim was able to give a statement at the scene of the shooting." *Crawford*, 848 So.2d at 627.

Finally, with respect to Mitchell's credibility, or lack thereof, petitioner claims that Mitchell's medical

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78. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 17.

records,[79] relating to the treatment he received following the shooting, should have been provided since they revealed that Mitchell had both marijuana and cocaine in his bloodstream. According to petitioner, even though Mitchell testified that he had used drugs and/or alcohol the night before the shooting, the medical records would have "provided objective proof that drugs were still in his system at the crucial, split-second moment he allegedly viewed the shooters. The jury could reasonably have inferred that he had used drugs more recently than the previous night, and/or that he was still under the influence of them at the time of the shooting."[80] This court, however, rejects petitioner's argument based upon the following reasoning set forth by the Fourth Circuit:

> The report indicates that Mr. Mitchell's system had cocaine and marijuana, but it is not clear from the report if the presence could only be attributed to use of these drugs on the day of the shooting, or if the results could also be indicative of use the night before, thus bolstering Mr. Mitchell's testimony. There is no indication that Crawford presented evidence at the post-conviction hearing, nor does he present any in his application, showing that the presence and levels of these drugs in

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79. A copy of said records are located at petitioner's Exhibit A, Bates-stamped pp. 494-499.

80. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 18.

> Mr. Mitchell's system could only have occurred with use on the day of the shooting. Crawford did not meet his burden of showing that this evidence proved Mr. Mitchell was so impaired at the time of the shooting that he could not identify his assailants.

*Crawford*, 848 So.2d at 627-628.

### 3. Impeachment of Detective Graffeo

Petitioner claims that if the State had produced the supplemental police report and the pre-trial statements of Davis and Mitchell, he could have used the information contained therein to impeach the trial testimony of Detective Graffeo. According to petitioner, Graffeo made two statements at trial that were "patently false". First, he testified that Davis could not provide him with a last name for "George", Lindsey's accomplice. However, Graffeo's supplemental report reflects that Davis identified Lindsey's accomplice as "George Ascort" and in her pre-trial statement, she identified the second shooter as "George Caldwell". However, as the Fourth Circuit noted in rejecting the instant claim, the "jury was aware that the police had the names of other Georges." *Crawford* 848 So.2d at 630. Specifically, Graffeo informed:

> Q. Did Ms. Davis also indicate to you whether she knew these individuals?

A. She said that she knew Mr. Lindsay because he had dated her sister previously.

Q. Was she familiar with George as well?

A. She knew him from the area but she didn't have a last name on him. I **received numerous last names, Jefferson, Ashcott [sic], and different names but no one was positively sure what it was.**[81]

Thus, given the fact that the jury was aware of the different last names initially assigned to the second shooter, the significance of the fact that Davis supplied two of the last names is relatively insignificant.

Petitioner next complains that Detective Graffeo testified that the persons providing him with various last names for "George", the second shooter, "knew that he hung around the area", i.e., the Fischer Housing Project, but knew that "he didn't live there."[82] Petitioner states that this testimony is false because the unidentified caller who provided Graffeo with the name "George Jefferson" specifically informed, as set forth in Graffeo's supplemental report, that Jefferson "lived or frequented the area of 2000 Lebouef Ct." in the Fischer Housing

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81. *See* State rec., vol. 3 of 5, trial transcript at p. 48 (emphasis added).

82. *See* State rec., vol. 3 of 5, trial transcript at p. 48.

Project.[83] Assuming *arguendo* that Graffeo was mistaken when he stated that the persons who contacted him with information regarding the identity of the second shooter represented that the shooter did not live in the Fischer Housing Project, the significance of such a mistake is negligible. However, as the Fourth Circuit observed, it is unlikely that Graffeo purposely testified falsely in light of the fact, as set forth in his supplemental report, that he "ran the name of George Jefferson, and the 2000 block of Lebouff [sic] Ct." through the computer, "but did not find any concrete information." *Crawford*, 848 So.2d at 630.[84]

**4. Evidence of Innocence**

Petitioner charges that "the single most important piece" of evidence suppressed by the State was "the fact that another, far more likely suspect was named as Lindsey's accomplice."[85] This evidence, referenced above, is the notation in Graffeo's supplemental police report that he received a telephone call from an unidentified black female who informed that the first name of one of the shooters was "George", while his last name was possibly "Jefferson, but the female was not sure."[86] Petitioner asserts:

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83. *See* petitioner's Exhibit A at Bates-stamped p. 430.

84. *See also* petitioner's Exhibit A at Bates-stamped p. 430.

85. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 19.

86. *See* petitioner's Exhibit A at Bates-stamped p. 430.

> George Jefferson was a violent criminal who lived in Davis's apartment building at the Fischer project; she lived in apartment 1C, he lived in 3C. . . . He also fit every height, weight, race, and age description given by callers to the N.O.P.D. Furthermore, Jefferson's arrest record reveals a history of outrageous violence; the Bailes shooting was completely consistent with this history.[87]

As stated earlier, under *Brady, supra,* the State is required to disclose to the defense evidence which is favorable to the defense **and material to guilt or punishment.** Evidence is considered material only if it is reasonably probable that had the evidence been disclosed, the result of the proceeding would have been different.[88] Information concerning an anonymous tip to the effect that someone named "George Jefferson" may have been one of the shooters, considered collectively with the other evidence which petitioner claims the State unconstitutionally suppressed, fails to satisfy the above-described materiality requirement as a result of the consistent eyewitness pre-trial and trial identifications of petitioner as the second shooter.[89] Accordingly, petitioner is not entitled to federal habeas corpus relief.

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87. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 19 (footnote omitted).

88. *See* discussion *supra* at pp. 19-20.

89. *See* discussions *supra* at pp. 23 and 29-30.

## C. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's last claim is that he was unconstitutionally denied effective assistance of counsel. In addressing this claim, the Louisiana Fourth Circuit Court of Appeals set forth the applicable law.

> The defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that his counsel's performance was deficient and that this deficiency prejudiced him. The defendant must make both showings to prove counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). Counsel's performance is not ineffective unless it can be shown that he or she made errors so serious that he or she was not functioning as the "counsel" guaranteed to the defendant by the 6th Amendment of the federal constitution. *Strickland, supra*, at 686, 104 S.Ct. at 2064. That is, counsel's deficient performance will only be considered to have prejudiced the defendant if the defendant shows that the errors were so serious that he was deprived of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693, 104 S.Ct. at 2068.

*Crawford*, 848 So.2d at 631-632, *quoting State v. Mims*, 769 So.2d 44, 72 (La. App. 4 Cir. 2000).

Petitioner first argues that counsel was ineffective due to his failure to obtain a copy of Mitchell's driver's license which reflected that Mitchell suffered from near-sightedness and was required to wear corrective lenses. Petitioner asserts that the driver's license could have been used to impeach Mitchell's ability to see his attackers.

The Fourth Circuit rejected petitioner's argument, concluding:

> There is no indication . . . that there was any evidence to make counsel believe that Mr. Mitchell had any visual disability, which would have alerted counsel to the possibility that Mr. Mitchell had vision problems. Nor is there any indication of whether or not Mr. Mitchell was wearing corrective lenses at the time of the shooting, be they glasses or contact lenses. It cannot be said that counsel was ineffective for failing to obtain Mitchell's driver's license prior to trial.

*Crawford*, 848 So.2d at 632. Petitioner, however, refutes the above conclusions, asserting that "[c]ommon sense dictates" in a case "involving only eyewitness testimonial evidence" that an investigation be undertaken with respect to the eyewitness's eyesight. Further, because "a pair of eyeglasses was found in Bailes's car", petitioner claims that counsel "could easily have argued that the glasses were Mitchell's, and that because the glasses were not shattered or blood stained, but were folded, Mitchell was not wearing them immediately prior to the shooting."[90]

In assessing an attorney's performance, every effort must be made "'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Sterling v. Dretke*, 2004 WL 2664247, *2 (5th Cir. 2004), *quoting Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "It is the petitioner who must overcome the presumption that defense counsel's performance fell within the broad range of reasonable professional assistance." *Id.*, *citing Riley v. Cockrell*, 339 F.3d 308, 315 (5th Cir.2003). Thus, arguments offered well "after the fact", regarding what counsel could have argued, are not favored for the purpose of establishing ineffectiveness on habeas corpus review.

Alternatively, even if petitioner's argument regarding what "common sense dictated" and what

90. *See* Federal rec., doc. # 12, petitioner's reply to response to habeas corpus petition at pp. 12-13.

counsel "could have argued" was sufficient to satisfy *Strickland's* deficiency prong, petitioner must still satisfy the prejudice prong. The court finds that petitioner was not prejudiced as a result of counsel's alleged deficiency in failing to apprise jurors of Mitchell's nearsightedness in light of the fact that Mitchell was not the only witness who identified petitioner as one of the shooters involved in the murder of Sherri Bailes. Shirley Davis, along with Mitchell, identified petitioner in a photographic lineup as well as at trial.

Petitioner next argues that counsel was ineffective due to his failure to obtain a "crime scene expert to testify that, based on the physical evidence found at the scene, the shooting could not have happened the way Davis described it." Petitioner elaborates that "[s]uch an expert could have shown that the presence of spent shell casings in the street, along with the steep angles of Bailes' bullet wounds, meant that the shooters fired from near Bailes' car, not from the porch."[91]

The above argument is without merit because it is based upon an incorrect assumption with regard to Davis' testimony. As noted earlier, contrary to petitioner's assertion, it was not Davis' testimony that the gunmen fired all of their rounds from the porch or the breezeway. Rather, Davis stated that the gunmen commenced firing as they were moving forward, off of

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91. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 23.

the breezeway and onto the street where Bailes' car was located.[92]

Petitioner next argues that counsel was ineffective in failing to question Davis with respect to her "more than two-month delay in identifying [petitioner]".[93] However, as the Fourth Circuit noted, "counsel did not pursue this line of questioning because of a ruling on a motion *in limine*, allegedly filed by [petitioner's] codefendant, which prohibited the State from mentioning threats made to Ms. Davis, unless either codefendant questioned her about this delay in contacting the police." *Crawford*, 848 So.2d at 632. Petitioner, however, counters that because there was no evidence to suggest that he, as opposed to his codefendant, ever threatened Davis, his counsel should have gone ahead and questioned Davis regarding the delay.

A definitive determination cannot be made with respect to whether or not petitioner's defense would have been hindered if the jury had heard testimony to the effect that Davis had been threatened by petitioner's codefendant. However, the fact that petitioner's counsel apparently believed such testimony would be harmful and therefore chose not to question Davis regarding the above-referenced two-month delay, is a matter of trial strategy. His decision in this regard cannot properly

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92. *See* discussion *supra* at p. 13.

93. *See* Federal rec. doc. # 1, petitioner's supporting memorandum at p. 23.

serve as a basis to support an ineffectiveness claim. *See Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004).

Petitioner's next argues that prior to trial Davis testified that "[t]hey did the shooting coming from off the porch..." and the shooters "didn't get close to the car". Petitioner contends that this testimony could have been used at trial to "lock [Davis] into her allegation that the shooters fired only from the porch or from the grassy area immediately in front of the porch" then counsel could have contrasted Davis' "locked-in" version of events with Mitchell's version and the physical evidence on the scene, thereby discrediting Davis. However, once again, petitioner's argument is based upon a faulty assumption regarding Davis' testimony. As stated earlier, Davis never contended, either pre-trial or at trial, that all of the shooting occurred as the shooters were coming off the porch. Rather, this was all of the shooting that Davis witnessed. Once the shooters came off the porch and onto the street, Davis did not follow them. The shooters were no longer in Davis' field of sight.

Petitioner next claims that counsel's cross-examination of Detective Graffeo was "inadequate." Petitioner briefly elaborates: "Simply by comparing the transcript of the February 21, 1995 suppression hearing . . . to the State's Answer . . . , [counsel] could have determined that Graffeo testified falsely under oath prior to trial when he stated that Lindsey made no statements following his arrest; cross-examination of

Graffeo on this point would have been highly damaging to Graffeo's credibility."[94]

The Fourth Circuit, in addressing the above claim, expounded upon the matter significantly more than petitioner.

> Crawford also asserts that his defense counsel was ineffective in his cross-examination of Detective Graffeo, the lead investigator in the murder. He first argues that if the defense counsel had compared Detective Graffeo's testimony at a pretrial hearing with the State's answer to his bill of particulars, the defense counsel could have discovered that Detective Graffeo testified falsely at the pretrial hearing when he stated that the codefendant did not give a statement to the police. Crawford contends that defense counsel could have used this information to impeach Detective Graffeo's credibility. He further avers that his defense counsel could have presented evidence that Detective Graffeo first obtained Crawford's name from his codefendant, rather than from a witness, and he theorizes that his codefendant would have been much more likely to name an innocent person (Crawford) as his accomplice rather than his real accomplice, who could

94. *See* Federal rec., doc. # 1, petitioner's supporting memorandum at p. 24.

> have given the police information damaging to him. Crawford asserts that cross-examination of Detective Graffeo on this point would have cast great doubt on the thoroughness of his investigation.

*Crawford*, 848 So.2d at 633 (quotation omitted).

The state appellate court ultimately rejected petitioner's claim, implicitly finding that he failed to make the requisite showing of prejudice. Specifically, the court reasoned:

> It is true that Detective Graffeo did not mention that he had received Crawford's name from Lindsey; Detective Graffeo only testified that "[d]uring my investigation I found that the last name of the subject was George Crawford." It is not clear how the jury's learning that Detective Graffeo got Crawford's name from Lindsey would somehow make it appear that Detective Graffeo's investigation was incomplete. Detective Graffeo may have initially obtained Crawford's name from Lindsey, but **the fact remains that both Mr. Mitchell and Ms. Davis identified Crawford in photographic lineups and at trial.** In addition, the fact that Detective Graffeo testified at a pretrial hearing that Lindsey did not make a statement would not, as theorized by Crawford, have so damaged the detective's credibility as to make his testimony

> unbelievable or to have made the jury find that his investigation of the case was incomplete.

*Crawford*, 848 So.2d at 633 (emphasis added). Because the above reasoning does not constitute an unreasonable application of *Strickland* to the facts of this case, petitioner's claim for habeas corpus relief is without merit.

Petitioner next complains that counsel was ineffective by virtue of the fact that he fell asleep at trial. In support of his claim, petitioner provides a single affidavit, from his mother, who claims that she observed counsel sleeping.[95] Petitioner also cites, in support of his claim, a single case, *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120, 122 S.Ct. 2347, 153 L.Ed.2d 174 (2002), wherein a habeas petitioner was successful in connection with his bid for habeas corpus relief based upon his claim that counsel fell asleep at trial. However, as shown below, *Burdine* is distinguishable from the instant matter.

In *Burdine*, 262 F.3d at 339, the Fifth Circuit, following its review of the testimony provided at a state evidentiary hearing, noted:

> Burdine called eight witnesses, including three jurors from the capital murder trialand the clerk of the court in which the trial was held. These four neutral witnesses, which the

95. *See* petitioner's Exhibit A at Bates-stamped p. 506.

> state habeas court found highly credible, testified that [counsel] repeatedly dozed or slept as the State questioned witnesses and presented evidence supporting its case against Burdine.

In contrast, petitioner's claim that defense counsel fell asleep during trial is "supported only by the affidavit of [his] mother", a fact which led the Louisiana Fourth Circuit to conclude that "the trial court did not err in failing to give credit to this claim". *Crawford*, 848 So.2d at 633.

Based upon the above, the court finds that petitioner's reliance upon *Burdine* is misplaced. The evidence supporting Mr. Burdine's ineffectiveness claim was significantly more substantial than the single affidavit offered by petitioner. Accordingly, his claim for habeas relief is without merit.

Finally, petitioner claims that counsel was ineffective due to his failure to move for a directed verdict based upon the State's failure to present sufficient evidence to support his conviction. However, in connection with this claim, petitioner cannot satisfy either of *Strickland's* prongs given this court's finding that the State, in fact, did submit sufficient evidence to support petitioner's conviction.[96]

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96. *See* discussion *supra* at pp. 10-18.

## RECOMMENDATION

For the reasons set forth above, **IT IS HEREBY RECOMMENDED** that George Crawford's petition for issuance of a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 be **DENIED.**

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Automobile Association,* 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 16th day of March, 2005.

s/ Louis Moore, Jr.

LOUIS MOORE, JR.
United States Magistrate Judge